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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. 73-291

SPORTS DIVERSIFIED, INC., a corporation, and ROBERT M. MOORE, JR.,

Petitioners,

v.

NATIONAL BANK OF COMMERCE OF TULSA, OKLAHOMA, CARNES CONSTRUCTION CO., DAVID L. MORGAN, AINSLIE PERRAULT, BUSINESS BUILDERS, INC., BILLIE GERALDINE MOORE, GLENN A. YOUNG, JACK S. ISAMINGER and EMMA WEBB, Administratrix of the Estate of FLOYD C. WEBB, Deceased.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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IN THE SUPREME COURT OF THE
UNITED STATES

SPORTS DIVERSIFIED, INC., a corporation, and ROBERT M. MOORE, JR.,	)	
Petitioners,	)	
vs.	)	
NATIONAL BANK OF COMMERCE OF TULSA, OKLAHOMA, CARNES CONSTRUCTION CO., DAVID L. MORGAN, AINSLIE PERRAULT, BUSINESS BUILDERS, INC., BILLIE GERALDINE MOORE, GLENN A. YOUNG, JACK S. ISA MINGER and EMMA WEBB, Administratrix of the estate of FLOYD C. WEBB, deceased,	)	No._____
Respondents.	)	

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OKLAHOMA

To The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Your petitioners, Sports Diversified, Inc., an Oklahoma corporation and its President,

Robert M. Moore, Jr., hereby petition for a writ of certiorari to review the decision of the Oklahoma Court of Appeals, Division 1, and the subsequent affirmation of the decision, as amended, by the Supreme Court of the State of Oklahoma through its denial of petition for certiorari, denying the individual petitioner the right to sue for the penalty for usury by a National bank, denying both petitioners the right to offset the unpaid usurious interest against suits by the National bank on the note and to foreclose a real estate mortgage securing same and denying petitioners constitutionally guarantied due process of law in connection with confirmation of foreclosure sale proceedings.

Opinions Below

The opinions and orders below were not officially reported but were unofficially reported

in the Oklahoma Bar Association Journal which contains the advance official sheets of the appellate courts of the State of Oklahoma. The original decision was unofficially reported in 44 OBAJ 261 and the order modifying the original decision upon petitions for rehearing and denying said petitions was unofficially reported in 44 OBAJ 1450. The order of the Oklahoma Supreme Court denying petitions for certiorari was unofficially reported in 44 OBAJ 748. These opinions and orders are appended hereto as Appendix A.

Jurisdiction

The original decision sought to be reviewed was made and entered on January 16, 1973. An order modifying the original decision and denying timely petitions for rehearing was made and entered on April 10, 1973. An order was made by the Oklahoma Supreme Court on May 15, 1973 denying timely petitions for certiorari. The

statutory provision believed to confer on this Court jurisdiction to review the judgments in question is 28 USC 1257 (3).

Questions Presented For Review

1. Whether a state court may deny a person who has paid usurious interest to a national bank the right to sue for recovery of the penalty provided by 12 USC 86.

2. Whether state courts may deny a corporation and an individual, both makers of an alleged usurious note to a national bank, the right in a suit upon the note to raise as a defense, pursuant to the provisions of 12 USC 86, the forfeiture of the entire interest which the note carried with it or which had been agreed to be paid thereon.

3. Whether a state court may award judgment to a national bank upon an alleged usurious note, which judgment includes interest accru-

ing before and after maturity and up to the date of judgment at rates contracted for in the usurious note (eight per cent and ten per cent, respectively) when this Court has construed 12 USC 86 to provide that a national bank is only entitled to recover the legal rate of interest (six per cent) from the date it commenced its action upon the note to the date of judgment.

4. Whether Federal Rule 13 has, by implication, amended 12 USC 86 so as to require the penalty claim for usury against a national bank to be offset against the principal amount of the note.

5. Whether a state court may, consistent with the due process of law required by the fourteenth amendment to the United States Constitution, require that the usury penalty provided by 12 USC 86 be applied in reduction of the judgment in favor of the national bank when, after

foreclosure sale the bank neither sought nor obtained a deficiency judgment in accordance with the applicable provisions of the state statutes.

6. Whether a state court may, consistent with the due process of law required by the fourteenth amendment to the United States Constitution, confirm a mortgage foreclosure sale of real estate based upon a judgment or judgments which were rendered after denying the makers of a note in favor of a national bank, which note said mortgage secured, the right to raise the defenses of usury provided in 12 USC 86 and which judgments included substantial amounts of interest in excess of that permitted by said statute.

Constitutional Provision Involved

Amendment XIV, United States Constitution, Section 1, Clause 2:

> "***nor shall any state deprive any person of *** property without due process of law.***"

Statutory Provisions Involved

12 USC 85: Rate of interest on loans, discounts and purchases:

"Any association may take, receive, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or Distrct, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States

of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. R.S. §5197; June 16, 1933, c. 89, §25, 48 Stat. 191; Aug. 23, 1935, c. 614, §314, 49 Stat. 711."

12 USC 86: Usurious interest; penalty for taking; limitations:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate or interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred. R.S. §5198."

Article 14 . Oklahoma Constitution, Section 2:

" The legal rate of interest shall not exceed six percentum per annum, in the absence of any contract as to the rate of interest, and, by contract, parties may agree upon any rate not to exceed 10 percentum per annum, and, until reduced by the Legislature, said rates of six and ten percentum shall be, respectively, the legal and the maximum contract rates of interest. "

15 O. S. §266:

"The legal rate of interest shall not exceed six per cent in the absence of any contract as to the rate of interest, and by contract, parties may agree upon any rate not to exceed 10 per cent per annum. Said rates of six and 10 per cent shall be, respectively, the legal rate and the maximum contract rates of interest. "

Federal Rule 13, Counterclaim and Crossclaim:

"(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has agai nst any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication

the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13. As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963. ***

12 O.S. §686:

"In actions to enforce a mortgage, deed of trust, or other lien or charge, a personal judgment or judgment or judgments shall be rendered for the amount or amounts due as well to the plaintiff as other parties to the action having liens upon the mortgaged premises by mortgage or otherwise, with interest thereon, and for sale of the property charged and the application of the proceeds; or such application may be reserved for the future order of the court, and the court shall tax the costs, attorney's fees and expenses which may accrue in the action, and apportion the same among the parties according to their respective interests, to be collected on the order of sale or sales issued thereon; when the same mortgage embraces separate tracts of land situated in two or more counties, the sheriff of each county shall make sale of the lands

situated in the county of which he is sheriff. No real estate shall be sold for payment of any money or the performance of any contract or agreement in writing, in security for which it may have been pledged or assigned, except in pursuance of a judgment of a court of competent jursidiction ordering such sale. The court may, in the order confirming a sale of land under order of sale on foreclosure or upon execution, award or order the issuance of a writ of assistance by the clerk of the court to the sheriff of the county where the land is situated, to place the purchaser in full possession of such land, and any resistance of the service of such writ of assistance shall constitute an indirect contempt of the process of such court, and if any person who has been removed from any lands by process of law or writ of assistance or who has removed from any lands pursuant to law or adjudication or direction of any court, tribunal or officer, afterwards, without authority of law, returns to settle or reside upon such land, he shall be guilty of an indirect contempt of court, and may be proceeded against and punished for such contempt. Notwithstanding the above provisions no judgment shall be enforced for any residue of the debt remaining unsatisfied as prescribed by this Act[1] after the mortgaged property shall have been sold, except as herein provided. Simultaneously with the making of a motion for an order confirming the sale or in any event within ninety days after the date of

the sale, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such n otice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date of sale or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus costs and disbursements of the action plus the amount owing on all prior liens and encumbrances with interest, less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.

In any action pending at the time this Act becomes effective or thereafter commenced, other than an action to foreclose

a mortgage, to recover a judgment for any indebtedness secured by a mortgage on real property and which originated simultaneously with such mortgage and which is secured solely by such mortgage, against any person or corporation directly or indirectly or contingently liable therefor, any party against whom a money ju judgment is demanded, shall be entitled to set off the fair and reasonable market value of the mortgaged property less the amounts owing on prior liens and encumbrances. Provided that nothing in this Section shall limit or reduce any deficiency judgment in favor of or in behalf of the State for any debts, obligations or taxes due the State, now or hereafter. R. L. 1910, §5128; Laws 1915, ch. 175, §1; Laws 1941, p. 35, §1."

Statement of The Case

On November 1, 1966, the respondent, National Bank of Commerce of Tulsa, Oklahoma, a national banking association, loaned the petitioner, Sports Diversified, Inc. the sum of $275,000 and Sports Diversified, Inc., Robert M. Moore, Jr. and Jack S. Isaminger, Jr. delivered their promissory note in that amount to the bank, which promissory note was for a term

of,"on demand or one year," providing on its face for interest payments of eight per cent per annum on the unpaid balance, payable quarterly, with principal payments of $13,750 to be made on June 30, 1967, and October 20, 1967, with a balance due at maturity. A copy of the promissory note is appended hereto in Appendix B.

A real estate mortgage of even date securing the said note and covering certain properties owned by the petitioner, Sports Diversified, Inc., in Creek County, Oklahoma, commonly known as War Bonnet Park Race Way, was delivered to the bank.

At the same time that the note and mortgage were delivered and the $275,000 loan proceeds were deposited in the account of Sports Diversified, Inc. at National Bank of Commerce a check prepared by a loan officer of the National Bank of Commerce and made payable to the

National Bank of Commerce in the amount of $8,250 marked, "Loan Fee," was signed by the President of the corporation and delivered to the bank officer. The $8,250 amounted to three percent of the amount of the loan and this three percent together with the eight per cent annual interest called for by the note itself constitutes the usury under 12 U.S.C. 86. See Appendix B.

On October 31, 1967, one day prior to the maturity of the note and after paying $24,899.89 interest and $13,750 principal, the petitioner commenced an action in the District Court of Tulsa County, Oklahoma, against the National Bank of Commerce for the statutory penalty for usury under 12 U.S.C.86, said case being styled, Sports Diversified, Inc. and Robert M. Moore, Jr., plaintiffs, vs. National Bank of Tulsa, Tulsa, Oklahoma, defendant, No. 115,924.

Thereafter, on November 8, 1967, the

National Bank of Commerce filed its answer denying usury and its crosspetition for judgment on its note against both the petitioners and the co-maker, Jack S. Isaminger, Jr., and the alleged guarantor, Floyd Webb, as additional parties plaintiff.

Upon motion by the petitioners herein the Tulsa County District Court separated the usury case and the crosspetition on the note for separate trials. In February, 1969, the separate trial of the petitioners' cause of action against the bank for usury was held and at the conclusion of all the evidence the bank moved for a directed verdict and this motion was sustained based upon an Oklahoma statute, 18 O. S. 1. 26 which forbade a corporation to plead usury either as defense or affirmatively. The petitioners herein moved for a new trial which was overruled and appeal No. 43, 410 was perfected

to the Supreme Court of the State of Oklahoma from the directed verdict.

In the opinions appealed from herein the Court of Appeals of the State of Oklahoma, Division 1, recognized the fact that 18 O.S. 1.26 had been declared unconstitutional by the Oklahoma Supreme Court in the case of Sullivan vs. Securities Investment Company, 43 OBAJ 885, 508 P.2d. 1077(March, 1972) and reversed the decision of the District Court of Tulsa County insofar as it directed a verdict against the corporation, Sports Diversified, Inc., and remanded the case for a new trial between Sports Diversified, Inc. and the National Bank of Commerce of Tulsa, Oklahoma upon the question of the usury penalty under 12 USC 86. The petitioner, Sports Diversified, Inc., does not complain of this decision insofar as it reverses the directed verdict for a new trial upon the merits between it and the bank

on the question of usury. However, the petitioner, Robert M. Moore, Jr., does complain of this decision in that it directed a verdict against him when the evidence clearly showed that he had paid a portion of the usurious interest to a national bank and was,therefore, entitled to sue for the recovery of the penalty provided by 12 USC 86. This forms the basis of the first question presented for review herein.

The pertinent portion of the transcript of proceedings, February 19-21, 1969; February 24-26, 1969; and March 3, 1969, are as follows:

Direct examination of Robert M. Moore, Jr. by Mr. Young:

> "Q (By Mr. Young) Examine Plaintiff's Exhibit 6 and 6-A and tell what those are.
>
> A (By Mr. Moore) Exhibit marked No. 6 is my customer's copy of a cashier's check which was purchased at the First National Bank and Trust Company in Tulsa.

Q Now, was that-- you say my. You personally?

A I personally bought this cashier's check at The First National Bank in the amount of $5,622.22, as the first interest payment on the note that we're talking about.

Q And what's the date of that purchase?

A February the 1st, 1967. This is also the due date of the first interest payment. (Indicating)

Q And how much is that amount?

A $5,622.22.

Q Now, you say 6 is your purchase personally; what is 6-A?

A 6-A is the photocopy of the cashier's check that was presented to the National Bank of Commerce as my first interest payment on this note. Of course, the date, February the 1st, 1967, is the same and the account-- or the amount, $5,622.22 is the same.

Now, on the back of it when I presented this as payment for my first interest payment, it's made out to me as an individual, and I said: "For deposit to the account of Sports Diversified, Inc. Account #104-514-8, for interest pay-

ment on note. Signed Robert M. Moore, Jr." and gave it to the bank.

Q Which bank?

A National Bank of Commerce.

Q And did they accept it and apply it on this note, Plaintiff's Exhibit 3, the $275,000 note?

A Yes, they did.

Q And what day was it handed to them and so endorsed?

A February the 1st, 1967. (Tr. 83-85)."***

"Q (By Mr. Young) I hand you what's been marked Plaintiff's Exhibit 9 for identification, and ask you to state what that is, please?

A That was a bank money order cashier's check dated May 1st, 1967, drawn on the Mannford State Bank payable to the National Bank of Commerce in the amount of $5,438.89.

Q Is that for interest?

A That is for interest. That's the May interest payment.

Q And who made that payment?

A I did.

Mr. Young: We offer into evidence Plaintiff's Exhibit Number 9.

Mr. Daniel: Yes, Your Honor, that's the one I furnished Mr. Young.

The Court: All right, It may be admitted.

Q (By Mr. Young) I show you what's been marked Plaintiff's Exhibit 10 for identification and ask you to state what that is?

A This is a cashier's check drawn on the First National Bank and Trust Company in Tulsa payable to myself, Robert M. Moore, Jr., in the amount of $5,588.61, dated August the 1st, 1967.

Q Who purchased that cashier's check?

A I did.

Q And paid it to whom?

A Paid it to the National Bank of Commerce.

Q And is this a Xeroxed copy of the original which is in the courtroom?

A Yes, it's a copy of the check.

Mr. Young: We offer this Exhibit--

Mr. Daniel: No objections, Your Honor.

Mr. Young: --into evidence and substitute the Xeroxed copy for the original.

The Court: Permission granted." (Tr. 100-101) ***

Cross examination of Robert M. Moore, Jr. by Mr. Daniel:

"Q All right. Now, Mr. Moore, I will-- if I can come around here if I may, excuse me, so that you can see this at the same time the jury can.

Would you please tell us what the source of the funds were for the $5,622.22 payment that you said was made on February 1, 1967?

A The-- I believe in February, and I'll have to refresh my memory, I've got a note over there that I signed. My counsel has it. But to the best of my recollection I borrowed that money from Ainslie Perrault.

Q All right. Did the $5,438.89 payment-- well, let me back up. Sports Diversified, Inc. is additionally indebted to Mr. Perrault in the approximate sum

of $16,000; is that correct, Mr. Moore?

A Yes, they are.

Q And it's been secured by a second mortgage on the real estate, the subject of this lawsuit.

A That's right." (Tr. 117)***

"Q (By Mr. Daniel) What was the source of the $5,438.89 payment; where did these funds come from?

A Ainslie Perrault.

Q Okay. I'm sorry. You'd already answered that question, hadn't you?

A No. because they are two of combination.

Q So he furnished these funds and--

A The first one, February 1st, was a personal note signed by Robert M. Moore, Jr. to Ainslie Perrault for $6,000.

The second payment of this 5438, I renewed my personal note with Ainslie and got additional funds.

Q All right. And how about the $5,588.61 payment?

A This came from Floyd Webb.

Q This money came from Floyd Webb?

A Yes.

Q Now, your corporation issued a note to Ainslie Perrault secured by a mortgage to the real estate to secure these two advances?

A Right. We renewed my note and gave a second mortgage on the other one to give additional collateral.

Q And at that time, title 2 to all of the property in question, that was in Sports Diversified, Inc., wasn't it, Mr. Moore?

A That's right.

Q All right, Now, did you-- Floyd Webb, you say, gave you the fifty-five eighty-eight. All right, now. Didn't the corporation issue a note to Mr. Webb in security for that loan?

A No, I did not.

Q Who is Mr. Webb, Mr. Moore?

A Well, Mr. Webb is now deceased and was a friend of mine who resided in Joplin." (Tr. 120-121).

***

Directed verdict by the Honorable Raymond W. Graham, District Judge:

"THE COURT: In reviewing the testimony and the evidence in the matter, considering the briefs and the many cases submitted and the many legal problems presented, that the Court at this time will rule number one, that as a matter of law, the plaintiff, Robert Moore, co-plaintiff Robert Moore, is not the alter ego of Sports Diversified, Inc.; that the National Banking Act does not prohibit the charging in excess of 8% interest and is governed by the constitutional and statutory provision of 10% interest; and that the Court finds that the corporation, the statute prohibiting a corporation from maintaining a defense of usury, that statute in addition thereto prohibits a corporation from prosecuting a claim for usury; that-- and in addition thereto, the Court finds that where two hypothetical cases-- or two-- let me find it. Where two constructions of the transaction are possible one against usury-- the one against usury will be adopted.

The Court finds from the testimony and that reasonable men would not differ, that the defendant has validly presented a tenable defense against usury based upon the testimony of Mr. Moore, the co-plaintiff in the action, and that the evidence-- and that the plaintiffs have failed to establish by clear and cogent evidence that the transaction was tainted with usury, and that the Court does hereby instruct and will hereby instruct the verdict-- instruct the jury to return a ver-

dict for the defendant and allow an exception to the plaintiffs and to all parties aggrieved.

We will summon the jury and I will see if he has a--

MR. YOUNG: Before the jury comes in, I would like to ask you if you're not overlooking the uncontradicted evidence on this August the 1st, 1967, payment.

Now, that was by Moore personal cashier's check purchased from The First National Bank and Trust Company and paid to the National Bank of Commerce.

THE COURT: I agree. And I further, in my findings, find that the-- that the plaintiff-- that Mr. Moore and the corporation, that the funds were intermingled and that intermingling of funds did not establish the character of Mr. Moore as alter ego of the corporation in spite of the commingling of the funds and the payments of funds even out of the pocket of the co-plaintiff, Mr. Moore.

You may summon the jury.

(The following proceedings were held in open court IN THE PRESENCE AND IN THE HEARING OF THE JURY, with all parties present represented by counsel:)

THE COURT: Ladies and Gentlemen of the Jury, the Court has kept you wait-

ing for some time while we've been hearing legal argument in the case, and I know, of course, that you have given your undivided attention for these many days and that all of the evidence is in. And it is with regret that I must inform you that the Court, as a matter of law in this matter, has sustained certain Motions that will remove your participation from the consideration of this case; and that following the statutes, the Court has instructed a verdict in favor of the defendant on the legal question, and that considering that reasonable persons could not differ, that I do, at this time, appoint a foreman of the jury-- and at this time I will eliminate the alternate juror from the consideration, and instruct the-- if I can find my jury list, I'll appoint the number one juror, Mr. Yarborough, to sign the instructed verdict for the defendants.

Now, you don't have to sign it, but if you refuse, I'll go down the list until I find one that will sign it. It is not a matter of discretion on your part. It is a matter of law, and that the Court will at this time instruct Mr. Yarborough to sign on behalf of the jury, the verdict instructing a verdict for the defendants.

MR. YOUNG: If the Court please, when you're through, I'd like to make a record.

THE COURT: All right. You may.

MR. YOUNG: At this time, we ask the Court to instruct the jury that under the Constitution of Oklahoma and the recent decisions on this point, they are not obligated to follow any directed verdict or instructed verdict; that we have a right under the Constitution of the United States and of Oklahoma to a jury verdict on the facts in this case. And it's been held on the east-- this has come up recently, and the only thing that you can do is declare a mistrial.

THE COURT: Well, I've instructed the-- the verdict. It is not mandatory that the jury sign it, and I would not place him in jail under direct contempt of Court if he refused to sign it. However, I would exhaust the jury panel in securing foremen in the event Mr. Yarborough refused to sign the verdict and then take other appropriate action if necessary to secure the directed verdict as ordered by the Court.

Mr. Yarborough, do you desire to sign the--

MR. YARBOROUGH: No, sir; I don't.

MR. YOUNG: If the Court please, now, this has been held clearly on the East Coast that the Court cannot take away an American citizen's right to constitutional determination of the jury.

THE COURT: Well,. I direct the verdict for the defendant, and secure--

Are there any persons on the jury that would desire to sign the verdict form?

(Juror number five and juror number two held up their hands.)

You may hand the verdict to the juror.

(Whereupon the bailiff handed the verdict to juror number five, Mr. Wensouer.)

MR. YOUNG: Now, we want the record to show that only one juror held up his hand, and that he has no right to have an instructed verdict by one juror by designating him under duress, a foreman of the jury; that American citizens, under the Constitution, have a right to a jury of their peers, nine of twelve, to determine their lawsuits on the question of fact no matter how big the defendant is in the lawsuits.

THE COURT: I have secured the verdict." (Tr. 409-413).***

In the original decision of the Court of Appeals of the State of Oklahoma, Division 1, appearing at 44 OBAJ, 264-265, the trial court, with reference to the directed verdict against the

petitioner, Robert M. Moore, Jr., states:

> "However, we think the trial court properly directed a verdict against Robert L. (sic.) Moore, Jr., individually. Usurious interest can be recovered only by the party paying it. 12 USC 1970, 86; 45 Am. Jur. 2d. Interest and Usury 319 (1969). The evidence in this case established that the interest payment came ultimately from corporate funds. The trial court also correctly decided that Sports Diversified was a separate entity, not Moore's alter ego, even though there was some intermingling of corporate with personal funds."

On March 25, 1969, a separate trial was commenced upon the counterclaim of the National Bank of Commerce of Tulsa, Oklahoma, upon its note dated November 1, 1966. Prior to the commencement of trial and on March 24, 1969, the petitioners filed an answer to counterclaim in which they alleged in part as follows:

> "For answer to the counterclaim of the National Bank of Commerce of Tulsa, a national banking association, plaintiffs: *** 3. Plaintiffs further allege that counterclaimant, National Bank of Commerce of Tulsa, Oklahoma, is a national

bank subject to the National Bank Act. Title 12, §86, of said National Bank Act requires forfeiture by a national bank of the entire interest which a promissory note carries with it when a usurious rate of interest has been agreed to be paid but remains unpaid thereon. Plaintiffs are entitled to the forfeiture of the entire interest and attorney's fees claimed by the counterclaimant as more particularly hereinafter set forth.*** 6. As a further condition of making said loan said counterclaimant national bank corruptly, unlawfully, knowingly, and intentionally reserved and required payment by plaintiff's, Robert M. Moore, Jr. and Sports Diversified, Inc., of interest in excess of that defendant national bank was permitted to charge by the National Bank Act. Said defendant knowingly, unlawfully, and intentionally charged 11 per cent (11%) interest and by said counterclaim now claims 13 per cent (13%) interest plus unnecessary attorney's fees of $53,275, making a total interest charge of 32.372 per cent. Defendant, counterclaiming bank,well knew that the maximum legal rate of interest in Oklahoma under the National Bank Act for such national bank was 10 per cent (10%). The agreement to such payment by plaintiffs, Robert M. Moore, Jr. and Sports Diversified, Inc., of such exorbitant, illegal, usurious interest was made a condition of said loan by said counterclaiming national bank.

7. On October 18, 1967, at a time

> when neither interest nor payment upon principal was due plaintiffs advised defendant-counterclaimant National Bank of Commerce of plaintiff's claim that said transaction was usurious. Said notice is in writing and said defendant-counterclaimant has a copy thereof."

On March 26, 1969, after jury trial had been commenced on March 25, 1969, the National Bank of Commerce of Tulsa, Oklahoma, filed a demurrer and a motion to strike directed to the answer to counterclaim filed by the petitioners herein on March 24, 1969, These motions were sustained by the Court and the pertinent portions of the transcript of proceedings, March 26, 1969, and April 15, 1969, are as follows:

> "(The following proceedings were held in open court before Judge Raymond W. Graham, OUT OF THE PRESENCE OF THE JURY, with all parties present represented by counsel:)
>
> THE COURT: In Sports Diversified, vs. National Bank of Commerce that the plaintiff filed combined motions of--
>
> MR. DANIEL: That's defendant bank.

THE COURT: --combined motions of the National Bank of Commerce to file Answers to Counterclaim and the Demurrer and the Motion to Strike of the Answer to Counterclaim filed on the -- 24th?

MR. DANIEL: Yes, the answer was filed on the 24th. The motion-- combined motions were filed this morning, Your Honor.

THE COURT: And the Court, after hearing arguments, sustained the Motion to Strike and the Demurrer and all particulars and leaves to the consideration of the Court and the jury the question of general denial, and--which would contain therein the tender and all other answers. Defense of usury is stricken and the Demurrer and Motion to Strike will be sustained in those particulars.

And the Court has conferred with counsel for the plaintiff and for the defendant; and thatthe Court has stated to counsel for the plaintiff, Mr. Young, that the Court would not permit Mr. Young to permit his client, Mr. Moore, to be a party to this litigation, would not permit the defense or purported defense of usury to be placed before the jury, and voir dire examination or in opening statements, and that he may make a record as to offer of proof in that regard, and the Court would make formal ruling thereon.

And in addition thereto, that there

was contention between Mr. Young and Mr. Daniel regarding the tender. And that the Court had advised counsel if they would make an offer of proof as to what their witnesses would state, that in the event that the Court ruled that there was not a tender made, but merely an offer of a tender, that the Court would rule on that matter, and then reserve its decision for a period of ten days and hand down the decision adverse to Sports Diversified, Inc.

That in the event the offer of proof did present to-- or the Court considered that that presented a question of fact for the jury, then the jury-- then we would complete the voir dire examination of the jury and proceed with the jury trial.

Now--

MR. UNGERMAN: It is so agreed by the party plaintiff, Isaminger.

MR. YOUNG: Let me make my record.

THE COURT: And the Court further had ruled on a portion of this lawsuit wherein the Court had ruled out, as a matter of law and directed a verdict against the plaintiff, that said Robert M. Moore was not the alter ego of the corporation, Sports Diversified, Inc.

Therefore, the Court in addition hold-

ing that a corporation in Oklahoma could not prosecute nor defend a claim of usury, and did direct a verdict. And a complete record has been made in that regard.

And if you desire, you may reincorporate all the testimony previously given in the trial on the position of alter ego and the position of Mr. Moore, and take exception to the Court's refusing to permit Mr. Moore to be a party to the litigation after a Dismissal Without Prejudice had been filed in the case by counsel for the defendant.

Now, Mr. Young, would you care to make your either offer of proof or whatever you desire in that regard?

MR. YOUNG: To each and all of these rulings, Sports Diversified, Inc., and Robert M. Moore, Jr., except.

We except to the following matters but not to exclude other exceptions.

We except generally and specifically to the Court's declaration that a corporation in Oklahoma in a suit against a national bank controlled by the National law, cannot sue one for the penalties for double interest actually paid. And too, for forfeiture of interest reserved but unpaid under the usurious transaction.

Two, we except to the Court's refusal to leave Mr. Robert M. Moore, Jr.,

individually in this suit for forfeiture after having permitted him to intervene by filing a joint answer and-- to the counterclaim of--

THE COURT: Let me interrupt there just a minute.

The Court granted permission on March 24th to permit the filing at the time of an Answer to the Counterclaim and by so doing the Court did not endorse the allegations made in the answer, and a similar situation would be in an ordinary negligence action providing counsel had failed to file their answer in time and whereupon they desired to interpose the defense of Act of God in a routine negligence action, the Court would permit the filing of the answer out of time without stating-- or without acknowledging that the affirmative defense of Act of God would be applicable in the case.

MR. YOUNG: We expressly call the Court's attention to Morton vs. Baker, 82 P2d 998, which holds that this is a mandatory intervention, and that it's reversible error not to permit the intervention. It's not discretionary. And that to deny the intervention is to deny equal protection of the law to deny any form in Creek County or Tulsa County for the trial upon evidence of the joint payment of usury or the reservation of usurious interest against joint makers, both of whom are co-makers, namely Sports

Diversified, Inc. and Robert M. Moore, Jr. individually, and is to deny the individual the benefit of the Federal law of forfeiture of interest upon a usurious transaction.

That is entered to-- to repeat it denies the individual severally. It denies the corporation individual and joint claims and the individual and the corporation jointly the benefit of the Federal law on forfeiture for usurious transactions of the interest reserved including attorney's fees.

We move for a mistrial upon the Court's partial impaneling of the jury yesterday in which we were denied an opportunity even to assert the defenses or interrogate the jury upon usury.

That the case was presented to the jury upon voir dire by the Court over objection of counsel as a case wherein Sports Diversified and Robert M. Moore, Jr. refused to pay a debt, when in truth and fact they had offered before the note was due or approximately the time of the demand on the note in November of 1966, and again here at the beginning of this trial, both the money and judgment for $261,250, reserving their claim and the sole issue of usury and forfeiture of interest for usury.

And the Court declined to permit any interrogation of the jurors upon this basis by reason of which we declared-- we

move for a mistrial.

THE COURT: Motion is denied.

MR. YOUNG: Exceptions, please.

THE COURT: Allowed."
(Tr. 4-9)

Thereafter, the primary defenses of the plaintiffs having been removed by the Court as set forth herein the parties stipulated on the evidence that would be presented had a trial before a jury been continued and the jury was discharged and the case passed for judgment and hearing on the attorney's fees until April 15, 1969. On April 15, 1969, the court entered a judgment in favor of the National Bank of Commerce of Tulsa, Oklahoma, upon its note for the sum of $305,377.49 (said amount being principal of $261,250 plus interest on that amount at eight per cent per annum from August 1, 1967, to the date of maturity of the note plus interest on $265,830.80 at 10 per

cent per annum from April 15, 1969, until paid), an attorney fee of $42,500 and the costs of the action. Exceptions were taken by all parties except the National Bank of Commerce and the petitioners herein timely filed an appeal in the Oklahoma Supreme Court as appeal No. 43,543. Copies of the court's judgments of February 26, 1969, and April 15, 1969, which were recorded in the judgment docket of the District Court of Tulsa County, Oklahoma, in Book 661 at pages 15 through 19, inclusive, are appended hereto in Appendix C.

In the meantime the National Bank of Commerce of Tulsa commenced an action on December 14, 1967, in the District Court of Creek County, Oklahoma, wherein the property covered by the petitioners' mortgage to it was located for the foreclosure of its mortgage, said case being filed under No. 35,423. Said case was commenc-

ed with the petitioner herein, Sports Diversifed, Inc., the respondents, Ainslie Perrault and Business Builders, Inc. as defendants. Thereafter, the respondent herein, Carnes Construction Company, was permitted to intervene and on January 21, 1969, Sports Diversified, Inc. and Robert M. Moore, Jr. intervened for the purpose of setting up the defenses of usury under 12 USC 86 in the foreclosure proceeding. A portion of the petition in intervention filed by the petitioners herein, Sports Diversified, Inc. and Robert M. Moore, Jr., read as follows:

"III

FIRST CAUSE OF ACTION

The intervenor, Sports Diversified, Inc. and Robert M. Moore, Jr. allege and state:

A. Plaintiff, National Bank of Commerce of Tulsa, Oklahoma, is a national bank and as such subject to the National Bank Act. Particularly, said national bank is subject to

the penalty for knowingly receiving payment of usurious interest imposed against national banks by 12 USCA 86. This is a suit thereunder for such penalty.***

D. As a condition of making said loan plaintiff National Bank required the intervenors Robert M. Moore, Jr. and Sports Diversified, Inc., jointly, as co-makers, to execute and deliver to the plaintiff said note and jointly and severally to enter into all the obligations thereof as makers.

As a further condition of making said loan said plaintiff, National Bank, corruptly, unlawfully, knowingly and intentionally reserved and required payment by the intervenors, Robert M. Moore, Jr. and Sports Diversified, Inc., of interest in excess of that which plaintiff National Bank was permitted to charge by the National Bank Act. Said plaintiff unlawfully and intentionally charged 11 per cent interest well knowing the maximum legal rate of interest in Oklahoma, under the National Bank Act for such national bank, was 10 per cent. Payments by intervenors, Robert M. Moore, Jr. and Sports Diversified, Inc., as such exorbitant, illegal, usurious interest was made a condition of said loan by the said plaintiff National Bank.

E. As required and demanded by the plaintiff National Bank, intervenors, Robert M. Moore, Jr. and Sports Diversified, Inc., paid, and said plaintiff corruptly took usurious interest as follows:

On November 1, 1966, $8,250; On February 1, 1967, $5,622.22; On May 1, 1967, $5,438.81; On August 1, 1967, $5,588.86;

being a total sum of usurious interest of $24,899.89.***

G. That by reason of the foregoing the plaintiff National Bank became indebted to the intervenors, Robert M. Moore, Jr. and Sports Diversified, Inc., for double the amount of money so paid as interest, to-wit: The sum of $49,799.78. Whereby, by reason of the National Bank Act, an action accrued to the intervenors, Robert M. Moore, Jr. and Sports Diversified, Inc., to recover of the plaintiff the sum of $49,799.78.

IV

SECOND CAUSE OF ACTION

For their second cause of action, the intervenors, Sports Diversified, Inc. a corporation, and Robert M. Moore, Jr.,

> adopt paragraphs A through G of their first cause of action as fully as though stated and repeated herein and further allege and state:
>
> That the plaintiff National Bank knowingly reserved a rate of interest greater than that allowed by the National Bank Act and intervenors allege that the reserving of interest at a greater rate than that allowed by the National Bank Act should be deemed a forfeiture of the interest which has not yet been paid under 12 USCA 86 and intervenors allege that they should be permitted to reduce the amount of their obligation to the plaintiff National Bank, if any, by an amount equal to the said usurious interest reserved in the amount of $5,350.11.***"

Thereafter, the respondent herein, National Bank of Commerce of Tulsa, filed a special plea to the jurisdiction and venue and demurrer and plea in abatement which last named pleadings alleged generally that the causes of action raised by the petition in intervention quoted herein are barred and prohibited by the application of 18 O.S. §1.26 (since held unconstitutional by the Supreme Court of the State of Okla-

homa) and that the issues raised in the petition in intervention had, since the filing of the petition in intervention, been determined by the judgment for the National Bank of Commerce in the Tulsa County proceedings on February 26, 1969. Thereafter, on March 31, 1969, an order was entered by the District Court of Creek County sustaining the special plea to the jurisdiction and venue raised by the National Bank of Commerce of Tulsa. Thereafter, on May 14, 1969, the petitioners herein filed their answer in the District Court of Creek County raising again the questions of usury. Thereafter, on March 2, 1970, judgment was entered for the National Bank of Commerce of Tulsa, Oklahoma, based upon the judgment in the Tulsa County proceedings dated April 15, 1969, in total sum of $347,877.49 with interest thereon at the rate of 10 per cent per annum from April 15, 1969, and foreclosing the mort-

gage given to secure the judgment and ordering the application of the proceeds of foreclosure sale and the payment of the various liens in the priorities therein ordered. A copy of the Creek County judgment dated March 2, 1970, is appended hereto in Appendix C.

Questions two and three presented herein for review deal with the matters set forth above relating to the judgments of the Tulsa County District Court entered on April 15, 1969, and the judgment of the Creek County District Court entered on March 2, 1970. The judgment entered by the District Court of Creek County on March 2, 1970, was not appealed to the Supreme Court of the State of Oklahoma. A motion to vacate that judgment was filed on March 13, 1972, and on March 27, 1972, the Court entered an order stating that it did not have jurisdiction to hear the defendant's motion to vacate because of

the proceedings pending in the Supreme Court of the State of Oklahoma under case No. 44,132 dealing with the post judgment proceedings. From that order entered March 27, 1972, the petitioners herein prosecuted a petition for writ of mandamus to the Supreme Court of the State of Oklahoma against the trial judge, Kenneth Hughes, which petition was denied without written opinion.

In the appellate proceedings before the Court of Appeals of the State of Oklahoma, Division 1 and the Supreme Court of the State of Oklahoma the matters raised in questions two and three presented for review herein were raised by assignments of error as follows:

> "The Court erred in sustaining the combined demurrer and motion to strike of National Bank of Commerce directed to the amended answer and counterclaim of plaintiffs, Sports Diversified, Inc and Robert M. Moore, Jr.

The Court erred in excusing defendant National Bank of Commerce from the penalty for reserving usurious interest imposed upon it by Title 12 USCA §86."

In its original decision the Court of Appeals of the State of Oklahoma, Division 1, held that the penalty claim provided by 12 USC §86 must be offset against the principal amount of the note because Federal Rule 13 had, in effect, amended the provisions of 12 USC 86 by implication. The Court's statement in this regard appears in 44 OBAJ at page 265 as follows:

> "The bank argues that we should affirm the verdict and judgment on the note rendered by the Tulsa County District Court, even though we reversed the directed verdict against Sports Diversified on the issue of usury. The bank says these matters are entirely unrelated and must be so treated because the Federal Statute, 12 USC 1970, §86, requires that the penalty for usury be recovered 'in an action in the nature of an action of debt' and because this has been construed to require an independent action and not permit setoff of the usury penalty against the amount of the unpaid note. However, the Federal cases so holding appear to ante-

date the adoption of the Federal rules which became effective in 1940. E. G. McCollum vs. Hamilton National Bank, 303 US 245, 58 S. Ct. 568 (1938). Since the effective date of the Federal rules, the Court of Appeals for the Tenth Circuit has approved the offset of the penalty claim against the amount of the note; holding that the provisions of the Federal rule on counterclaims (because the Federal rules have the force of statutes) in effect have amended the provisions of 12 USC §86 by implication. John R. Alley and Company vs. Federal National Bank, 124 Fed. 2d. 995 (10th Cir. 1942). We must follow this decision instead of the other since it is binding on the Federal District Court setting in Oklahoma. It would be a curious result if a suitor could offset the penalty against the note in a case brought in Federal Court in Oklahoma, but could not if the suit were commenced in the Oklahoma courts even though Oklahoma requires and allows setoff of money claims against money claims to substantially the same extent permitted by Federal Rule 13. 12 O.S. 1961 §273, 324. Moreover, we are bound by Federal decisions in the interpretation of Federal statutes, and this is the only Federal decision on the point we have, since the effective date of the Federal rules. Of course, the amount of the interest charged but unpaid may be set off or credited against the principal of the note in any event, even under the earlier Federal decision."

This statement in the original decision of the Court of Appeals forms the basis for the fourth question presented for review herein. Petitioners do point out at this time that they would not object to the offsetting of the usury penalty against the principal amount of the note and, in fact, have urged the same in their appearances in both the trial courts and the appellate courts in these cases. However, when taken in the full context of the opinion of the Court of Appeals as modified it becomes incumbent upon the petitioner to urge that the rule enunciated by the Court of Appeals be reversed because in 44 OBAJ at page 1451 the Court of Appeals stated:

> "In appeal No. 43,543, judgment on the note for attorney's fees is affirmed, subject to a deduction of the amount due the bank if Sports Diversified is successful in a retrial of the usury question."

This brings us to the factual basis for the fifth question presented herein for review. After

the March 2, 1970, judgment was entered by the District Court of Creek County and after execution proceedings therein a foreclosure sale was held and the National Bank of Commerce of Tulsa, Oklahoma, purchased the property covered by the mortgage securing the note discussed herein for the sum of $275,000 which was two-thirds of the appraised value of the property according to the appraisal in the Creek County proceedings which was $405,000. In its motion to confirm the bank did not request a deficiency judgment nor did it, within the 90 days thereafter, request a deficiency judgment against the petitioners in accordance with 12 O.S. 686 heretofore reprinted in full. The issue raised by the fifth question presented for review herein deals with whether a state court, in this case the Court of Appeals of the State of Oklahoma, Division 1, can, consistent with the due process of law required by

the Fourteenth Amendment of the United States Constitution require that the usury penalty provided by 12 USC 86 ultimately awarded by the trial court to the petitioners after an appropriate jury trial be applied in reduction of a judgment in favor of the National Bank when after foreclosure sale the bank has not complied with the State statutes and obtained a deficiency judgment for the amounts not covered by the proceeds of sale.

The facts supporting the sixth question presented for review herein are essentially the same as those mentioned in connection with the second and third questions presented review herein except that in the sixth question petitioners present the issue of whether a state court may, consistent with the due process of law required by the Fourteenth Amendment to the United States Constitution, confirm a mortgage foreclosure sale of real estate based upon a judgment or

judgments in which the petitioners' rights under 12 USC 86 have been violated and which judgments contain substantial amounts of interest of which the bank is not entitled under the applicable statutes and cases as will be more fully hereinafter discussed.

Appeal No. 44,132 to the Supreme Court of the State of Oklahoma dealt with the confirmation of the mortgage foreclosure sale arising out of the Creek County District Court proceedings.

POINT I

DENIAL BY THE STATE COURT OF PETITIONER ROBERT M. MOORE JR.'S RIGHT TO SUE FOR THE RECOVERY OF THE STATUTORY PENALTY FOR USURY IS IN DIRECT CONFLICT WITH THE EXPRESS PROVISIONS OF 12 USC 86.

In the case of usurious note to a National bank the applicable provision of the National Bank Act, 12 USC 86, makes two provisions:

1. If the interest has merely been

reserved or charged but remains unpaid then the entire interest is forfeited.

2. If the interest has been paid, "the person by whom it has been paid, or his legal representatives," may recover twice the amount of the interest paid in a separate action.

In the statement of facts petitioners quote extensively from the transcript of the direct and cross examination of the petitioner Robert M. Moore, Jr. A fair examination of the quoted portions of such testimony indicates that the $8,250 loan fee charged by the bank was paid from the proceeds of the note dated November 1, 1966, by Sports Diversified, Inc. and that the first two interest payments, although made ostensibly by Robert M. Moore, Jr., ultimately were secured by a corporate note and a mortgage upon corporate property. It is equally apparent

that the petitioner Robert M. Moore, Jr. paid the last payment from monies borrowed by him from a personal friend. The testimony is that no note or other security for the money was given to the lender of the last interest payment and no corporate stock or other security was issued to him by the corporation.

Since the actual payment of the usurious interest is a condition precedent to the enforcement of the liability of the respondent National Bank of Commerce of Tulsa, Oklahoma, under the National Bank Act the petitioner Robert M. Moore, Jr. contends that based upon the evidence set forth herein he is entitled to have a jury determine whether the note was usurious and, if so, the amount of the interest paid by each of the respective petitioners herein.

POINT II

DENIAL BY THE STATE COURT OF

THE PETITIONERS' RIGHTS TO RAISE AS A DEFENSE THE FORFEITURE OF THE ENTIRE INTEREST WHICH THE NOTE CARRIED WITH IT OR WHICH HAD BEEN AGREED TO BE PAID THEREON IS IN DIRECT CONFLICT WITH THE EXPRESS PROVISIONS OF 12 USC 86 AND WITH THE APPLICABLE DECISIONS OF THIS COURT.

Throughout the Tulsa County and Creek County proceeding and throughout the proceedings at the appellate level petitioners have contended that under 12 USC 86 they are entitled to a forfeiture of the entire interest which the note carried with it and which had been agreed to be paid thereon. Just as consistently the State Courts had denied the petitioners the right to set off the unpaid interest against the bank's counterclaim upon its note. Involved here is the statutory provisions of the National Bank Act permitting the forfeiture of the entire interest where the National bank has taken, received, reserved or charged a rate of

interest greater than is allowed by 12 USC 85. Under 12 USC 85 the applicable rate for a National bank shall be the interest at the rate allowed by the laws of the state where the bank is located. Article 14, Section 2 of the Oklahoma Constitution and 15 O.S. 266 provided, at the time this note was made and the petitioners' cause of action arose, the legal and maximum contract rates of interest, respectively, were six per cent and 10 per cent. Therefore, the maximum rate of interest that a National bank could charge under 12 USC 85 was 10 per cent per annum.

Under the evidence the note carried a contract rate on its face of eight per cent. However, a three per cent loan fee was exacted at the time of the execution of the note and the mortgage involved herein which made a total of 11 per cent exacted by the National Bank of Commerce for the forbearance of the $275,000 loaned

to the petitioners on November 1, 1966.

This Court, in the case of Brown vs. Marion National Bank, 169 U.S. 416, 42 L.ed. 801, 18 S.Ct. 390, stated that:

> "If a bank, which violates that section, (12 USC 86) sues upon the note, bill, or other evidence of debt held by it, the debtor may insist that the entire interest, legal and usurious, included in his written obligation and agreed to be paid, but which has not been actually paid, shall be either credited on the note, or eliminated from it, and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit."***

A cursory review of those portions of the record set forth in the statement of the case herein will indicate that the petitioners d ligently attempted to assert at every level from trial court to this court the error in the denial of the petitioners' rights to have the interest which had been charged but remained unpaid forfeited by the court.

This error did not just occur in the Tulsa County proceedings as is abundantly clear from a review of the record. This error also continued in the Creek County proceedings and every effort of the petitioners to raise the defenses of usury, either by way of answer and setoff or by the device of petition in intervention, was met with the same consistent ruling that the petitioners were not entitled to raise the defense of usury. Even after the Court of Appeals of the State of Oklahoma, Division 1, had ruled that the statute forbidding a corporation from raising the defense of usury or suing for usury was unconstitional. It then followed the erroneous path of the trial courts and resolved all Federal and constitutional issues against the petitioners by holding that the directed verdict against Robert M. Moore, Jr. should stand and ignoring the petitioners claims concerning the failure of the trial courts

to grant them the right to raise the defenses of usury. This consistent error from trial court to the Supreme Court of the State of Oklahoma, it is submitted, requires a reversal of the proceedings below and that the cases be remanded to the trial courts for trial during which the petitioners would be permitted to raise the defenses of usury provided to them by the Federal Statute.

POINT III

JUDGMENTS OF THE STATE COURT WHICH INCLUDE INTEREST AT THE RATE OF EIGHT PER CENT BEFORE OCTOBER 20, 1967, AND AT THE RATE OF 10 PER CENT THEREAFTER UNTIL THE DATE OF JUDGMENT ARE IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT HOLDING THAT IN THE CASE OF A USURIOUS NOTE A NATIONAL BANK IS ONLY ENTITLED TO RECOVER THE LEGAL RATE OF INTEREST FROM THE DATE IT COMMENCED ITS ACTION ON THE NOTE TO THE DATE OF JUDGMENT.

Under the case of Brown vs. Marion Nat-

tional Bank, supra., this Court has held that where a bank having violated 12 USC 86 sues upon the note is only entitled to judgment for the principal debt with interest at the legal rate from the commencement of the suit. We have heretofore seen that the legal rate of interest in Oklahoma at the time this note was made and the cause of action arose was six per cent per annum. Therefore, assuming the note was usurious, and the Court of Appeals of Oklahoma, Division 1, has decided that Sports Diversified, Inc., at least, is entitled to a jury trial on that question, then the respondent National Bank of Commerce was only entitled to interest at the legal rate of six per cent per annum from November 7, 1967, the date it filed its answer and counterclaim, to April 15, 1969, the date of judgment, and thereafter at the rate of 10 per cent per annum.

As entered, the Tulsa County judgment

dated April 15, 1969, awarded the bank total interest to the date of judgment in the total amount of $44,127.49. Under the rule laid down by this court in the case of Brown vs. Marion National Bank, supra., there can be no interest until the bank commences its suit upon the note and then only at the legal rate which was six per cent per annum. Interest at the rate of six per cent per annum on the unpaid principal balance of $261,250 is a total of $22,564.38 from November 7, 1967, to April 15, 1969. This means, very simply, that the Tulsa County judgment as affirmed by the Court of Appeals of the State of Oklahoma, Division 1, included illegal, unlawful interest in the amount of $21,563.11.

When the Creek County District Court entered its judgment based upon the Tulsa County judgment it carried forward the exact figures used in the Tulsa County judgment (combining

principal, interest and attorney's fees into one figure of $347,877.49 with interest thereon at the rate of 10 per cent per annum from April 15, 1969, until paid) and, therefore, perpetuated the error created by the misinterpretation of this court's ruling by the state courts.

Thereafter, there occurred foreclosure proceedings on the 887 acres of land covered by the mortgage securing the usurious note and the interest error mentioned herein amounted to almost 10 per cent of the amount bid by the National Bank of Commerce at the sheriff's sale.

Petitioners respectfully submit that these judgments should not be permitted to stand in the event petitioners are successful in the retrial of the usury issue in the Tulsa County District Court and that the Court of Appeals of the State of Oklahoma, Division 1, erred in modifying its original decision to affirm the judgments of both the Tulsa

County and Creek County District Courts.

POINT IV

JUDGMENT, HOLDING THAT FEDERAL RULE 13 HAS AMENDED 12 USC 86 SO AS TO REQUIRE OFFSETTING OF USURY PENALTY AGAINST USURIOUS NOTE AND ORDERING THAT PENALTY, IF ANY, BE APPLIED AGAINST BALANCE DUE ON NOTE AFTER FORECLOSURE WITHOUT DEFICIENCY JUDGMENT, AMOUNTS TO A DEPRIVATION OF PETITIONERS' PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioners are not unmindful of their position herein in asserting error of the Court of Appeals of the State of Oklahoma, Division 1, in holding that the penalty provided by 12 USC 86 should be offset against the usurious note under Federal Rule 13 when petitioners have consistently asserted in all the trial and appellate proceedings up to this time that the usurious penalty should be offset against the note together with the for-

feiture of unpaid interest heretofore discussed and the reversal of the foreclosure proceedings based upon such judgment.

The Court of Appeals decision, however, puts the petitioners in the untenable position of having their 887 acres of property along Keystone Lake taken into foreclosure proceedings in which, pursuant to 12 OS. 686, the respondent Bank did not seek a deficiency judgment within the time allowed and then when given a new trial upon the usury question are ordered, by the last paragraph of the opinion, to apply the amount of the usury penalty, if any, against the balance due on the Bank's note.

The Court of Appeals of the State of Oklahoma, in its opinion, relied upon the case of John R. Alley & Company vs. Federal National Bank, 124 F. 2d 995 (10th Cir. 1952). In that case the Court of Appeals for the Tenth Circuit stated:

"The Congressional authority given the Supreme Court to adopt rules was limited to matters of procedure in the Federal District Court. It was expressly provided that substantive rights should neither be abridged, enlarged nor modified. They were left untouched by the rules. 48 Stat. 1064, 28 U.S. C.A. §723b***

It is necessary to distinguish between a substantive right and the vehicle or medium through which it is enforced. The substantive right created by the statute is the right to recover twice the amount of usury as a penalty. This right could in no wise be affected by the new rule. The method or procedure provided in the statute for the enforcement of the right was an independent action in the nature of an action of debt, and under the decisions it was held that this right could not be asserted in the form of a counterclaim in a pending action. But the new rules provide for settlement of all controversies arising between parties in a single action. They specifically provide for compulsory counterclaims arising out of a 'transaction' or 'occurrence.' The right to the penalty admittedly arose out of the transaction which the bank seeks to enforce and is therefore maintainable as such under the new rule.

> If there is a conflict between the procedure provided for in the statute for the enforcement of the right created thereby and that provided for in the new rules of civil procedure, the former must yield to the latter, because the Congressional authority under which the new rules were adopted expressly provides that after they become effective any laws in conflict therewith are of no further force or effect. New rules have the force and effect of statutes."

The State of Oklahoma has not, either by Legislative enactment or judicial pronouncement, adopted the Federal rules of civil procedure in Oklahoma. The Oklahoma Legislature has enacted a permissive counterclaim statute, 12 O.S. 323, but there is neither rule nor statute making counterclaims compulsory.

The procedural aspects of a suit for the penalty for usury under 12 USC 86 against a National bank in a state court are governed by state laws and state rule. The Federal rules of civil procedure do not apply in Oklahoma State

courts unless and until they have been adopted or enacted in the State of Oklahoma. If the Court of Appeals of the State of Oklahoma, Division 1, is going to hold that Federal Rule 13 applies in this situation one wonders when the Court of Appeals is going to hold that our civil juries must render unanimous verdicts as in the Federal procedure.

But more important to the petitioners herein than whether or not the penalty for usury may be offset against the note in a suit by the bank is the question of whether a judgment for the usury penalty may be ordered applied to the balance due on a note after mortgage securing same has been foreclosed, the foreclosure proceedings confirmed and no deficiency judgment sought within the time allowed by 12 O.S. 686. This holding, if carried to its ultimate conclusion, would mean that the bank could purchase the property secur-

ing its note at a sheriff's sale, have that sheriff's sale confirmed by the court, let it's time for applying for a deficiency judgment expire and then, in the retrial of the usury case, have a judgment rendered against it and seize the judgment in satisfaction of the unpaid balance on its previous judgment which had, under the statute, been extinguished when the foreclosure sale was confirmed and no deficiency judgment sought.

This, the petitioners contend, amounts to a taking of their property, both real and personal, in a manner that does not secure to them the protection of the Fourteenth Amendment to the United States Constitution.

This result surely was not intended by the Congress nor by the courts interpreting the Congressional Enactment and constitutes, in the petitioners' opinion, gross and inequitable taking of their property and property rights without due

process of law. Surely, a reversal of the holdings of the Court of Appeals in this regard is required.

POINT V

THE CONFIRMATION OF A MORTGAGE FORECLOSURE SALE OF REAL ESTATE BASED UPON JUDGMENT RENDERED AFTER DENIAL OF EXPRESS RIGHTS UNDER 12 USC 86 AND THE DECISIONS OF THIS COURT WHICH PROBABLY INCLUDE INTEREST AND PRINCIPAL ERRORS OF AN AMOUNT IN EXCESS OF $70,000 CONSTITUTES A DEPRIVATION OF PROPERTY WITHOUT THE DUE PROCESS OF LAW REQUIRED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Court will recall the discussion by the petitioners herein under Point III of the error of the Tulsa County judgment in the interest charges included in the judgment in the amount of $21,563.11 and the fact that the Creek County District Court carried this error forward in its judgment rendered March 2, 1970.

Furthermore, if the Court of Appeals

were to be upheld herein and the $49,799.78 claimed by the petitioners in the usury action were to ultimately be awarded to them in the retrial of that case, then, the total error in the judgment dated March 2, 1970, rendered by the Creek County District Court, upon which a sheriff's sale was held and confirmed, would be in excess of $70,000.

The Creek County District Court judgment, it will be recalled, was based upon the Tulsa County District Court judgment and in the statement of facts herein petitioners have shown numerous occasions when the petitioners attempted to assert the defenses of usury granted to them by 12 USC 86 and were consistently, in both courts, met with denials of their right to do so. We have heretofore stated that because of the denial of petitioners' rights to the defense of usury, under the express provisions of 12 USC 86, a reversal of

the Tulsa and Creek County judgments must be had. We now contend that not only must there be a reversal of the judgments themselves but there must be, consistent with the due process of law requirements of the Fourteenth Amendment to the United States Constitution, a reversal of the sheriff's sale and confirmation proceedings in the Creek County District Court whereby the 887 acres of land securing the bank's loan to the petitioners was sold to the bank for $275,000 upon an appraisal made by appraisers suggested by the bank's attorney and confirmed without opportunity for hearing, although the petitioners' witnesses, in opposition to the confirmation of the sale, were present, sworn and ready to testify.

Petitioners recognize that this Court has heretofore held, in a few cases, that a violation of the Fourteenth Amendment does not occur simply because there has been an erroneous de-

cision of a State court after a full hearing in the regular course of judicial proceeding.

However, a review of the transcripts which were before the Court of Appeals reveals that the petitioners filed a motion to set aside the confirmation of a sheriff's sale and on August 31, 1970, a hearing was held before Judge Kenneth Hughes of the Creek County District Court, at which time the hearing was prematurely terminated after examination of only one witness and while three or four witnesses were waiting in the hall having already been sworn and under subpoena to testify in support of the petitioners' motion.

Based upon this deprivation of the right to a full hearing and upon the fact that petitioners' land has been taken upon a clearly erroneous judgment of the trial court and with a clear denial of the express rights of the petitioners under the Federal statute. The petitioners request that the

confirmation of sale proceedings in the District Court of Creek County, as confirmed by Appeal No. 44, 132, be reversed and set aside.

CONCLUSION

This Court should grant certiorari and the judgments below in Appeal Nos. 43, 410, 43, 543 and 44, 132 should be reversed except insofar as they reverse the directed verdict of the District Court of Tulsa County on the usury question as to the petitioner, Sports Diversified, Inc.

Respectfully submitted,

Earl W. Wolfe,
Attorney for the Petitioners
5963 East 31 Street - Suite 115
Tulsa, Oklahoma 74135

the injury suffered not only was accidental, but also that it arose out of an in the course of his employment. Carpenter v. Douglas Aircraft Co. (1966), Okl., 420 P.2d 911. We have defined the statutory language "in the course of" employment innumerable times, as referring to time, place and circumstance. The liberal construction accorded the Act, and the presumption extended under Section 27, supra, do not mean an employee must be compensated for injury simply because he was an employee. The evidence must establish claimant was on the employer's business, and that injury occurred during a time the employee was performing some duty for the employer. See Lane-Wells Company v. Brewer, (1967), Okl., 433 P.2d 959. Whethe accidental personal injury arose out of an course of the employment is a question of for determination of the State Indust Court where the evidence is in conflict. F ings of fact by the State Industrial Court conclusive reasonably tending to sup such findings. Thomas Block Company Pennokee, (1970), Okl., 477 P.2d 675. The f ing by the State Industrial Court is reasons supported by competent evidence.

Order sustained.

All Justices concur.

Opinions of Court of Appeals

Prepared for Publication by Office of the Chief Justice of Supreme Court

(Division No. 1)

SPORTS DIVERSIFIED, Inc., et al., Appellants, v. NAT'L BK. OF COMMERCE OF TULSA, Appellee.

Nos. 43410, 43543, 43634. Jan. 16, 1973.

CARNES CONST. CO., et al., Appellants, v. MORGAN et al., Appellees.

No. 44132.

(This Opinion Not to Be Considered as Precedent or Authority and Not for Publication in the Official Reporter)

Appeals from District Court, Tulsa County; Raymond W. Graham, Judge.

AND

From District Court, Creek County; Kenneth Hughes, Judge.

Affirmed in part, reversed in part, and remanded with directions.

Earl W. Wolfe, Sapulpa, for appellants.

Robert M. Moore, Jr., Mannford, pro

Sam P. Daniel, Jr., Doerner, St Saunders, Daniel & Langenkamp, Tulsa appellee.

James D. Groves, Tulsa, for appe Carnes Construction Company.

ROMANG, J. The above styled and bered cases were consolidated by order Supreme Court on July 29, 1969, and ass to the Court of Appeals, Division No. March 7, 1972. Reference will be made parties as follows: Sports Diversified, In such or as Sports; Robert M. Moore, J Moore; National Bank of Commerce of T Oklahoma, as Bank; and Carnes Constru Company as Carnes. Others will be iden by their full names.

On November 1, 1966, the Bank l Sports Diversified $275,000.00 and took in that amount secured by mortgage o along Lake Keystone in Creek County developed portion of which ultim became known as War Bonnet Raceway note also bore the signatures of Moor Jack S. Isaminger, Jr., and provided th principal would be due upon demand

year after date with interest at eight percent per year. An $8,250.00 loan fee, amounting to 3 percent of the face amount of the loan, was paid to the Bank immediately upon receipt of the proceeds.

Sports, through Moore, made the principal and interest payments called for in the note except for the fourth quarterly interest installment and the second principal installment. On October 31, 1967, one day before the maturity date of the note, Sports and Moore commenced an action against the Bank in the District Court of Tulsa County alleging that the eight percent interest and three percent loan fee exceeded the maximum of ten percent interest then allowed under the usury laws of Oklahoma and, therefore, violated the National Banking Code; asking that they recover double the amount of the interest paid, the penalty authorized by the Federal statute. By cross-petition, the Bank sued for the balance due under its note together with interest and attorney's fees.

The Tulsa County Decision on Usury—Appeal No. 43410.

In February, 1969, separate trial of the plaintiffs' cause of action for usury was held. Upon motion, the Tulsa County District Court directed a verdict for the Bank upon this issue, in part, because it was the opinion of the court that the evidence was insufficient to make out usury and, in part, based upon 18 O.S. 1961, 1.26, which forbids a corporation to plead usury either as a defense or affirmatively. Sports and Moore moved for a new trial which was overruled. Appeal No. 43410 is from this directed verdict.

The Tulsa County Decision on the Receivership—Appeal No. 43634.

In March, 1968, the District Court of Tulsa County appointed a receiver who proceeded to take charge of the assets of the corporation, primarily consisting of the War Bonnet Raceway. Prior to the trial of the usury action, Sports and Moore had filed a motion to vacate the receivership. The hearing on this matter was delayed until June 2, 1969. At that time the court overruled the motion of Sports and Moore and entered its order confirming the reports of the receiver, which included a recommendation to the effect that the property should be sold to satisfy the claims of creditors. Sports and Moore appealed the order refusing to vacate the receivership and confirming the receiver's reports under Appeal No. 43634.

The Tulsa County Judgment on the Note—Appeal No. 43543.

The Bank's counterclaim on the note was set for separate trial by pre-trial order and was heard on April 15, 1969. The Tulsa County District Court entered judgment for the Bank against Sports and Moore for the balance due on the note, accrued interest, and an attorney fee of $42,500.00 for Sam P. Daniel, Jr., the Bank's attorney. Sports and Moore appeal from this judgment under Appeal No. 43543.

The Creek County Judgment—Priority of Liens and Sale on Mortgage Foreclosure—Appeal No. 44132.

This case, a suit to foreclose the mortgage on War Bonnet Raceway and environs, was commenced in Creek County District Court by the Bank in December, 1967, shortly after the above proceedings were getting underway in Tulsa County. The mortgage foreclosure action was against Sports Diversified and other parties who claimed liens on the property. The intervenor, Carnes, subsequently filed its petition in intervention setting up a claim and lien for labor and materials performed and furnished, respectively, on the mortgaged property.

Thereafter, Sports Diversified dismissed its lien foreclosure action but remained in the suit still asserting its claim of lien foreclosure but as a defendant to the intervenor's and other lienholders' claims. The claims remained, in substance, exactly the same as before despite this switch in the status of the parties.

After some delay for an abortive corporate reorganization attempt by Sports Diversified in Federal Court under the Bankruptcy Act, the Bank, using its Tulsa County District Court judgment on the note against Sports and Moore as a basis, secured a judgment in the District Court of Creek County on March 2, 1970, foreclosing the mortgage, establishing

the priority of liens upon the property and entering judgment for certain other parties thereto. (Although appealed by Sports Diversified, the Tulsa County judgment on the note was not superseded immediately and so became available to prove the facts established by it in the Creek County suit.) One appeal was taken from this Creek County judgment by the receiver, but was later voluntarily dismissed by him.

The Bank then proceeded to take the necessary action for a foreclosure sale by the Creek County Sheriff. A hearing was held on July 11, 1970, on the Bank's motion to confirm the May 27th sale of the property and on the objections thereto of intervenor, Carnes, Moore and Sports Diversified. The main thrust of the objections was that the appraisal was not filed prior to the advertisement of sale in accordance with 12 O.S. Supp. 1969, 761. During a dialogue with the court concerning the sheriff's failure to file the appraisal with the clerk, counsel for the intervenor referred to a previous higher appraisal of the property at $636,500.00 made in the Tulsa County District Court proceedings. The court ordered a new sale by reason of the sheriff's failure to timely file the appraisal but ordered the new sale "based on the appraisement that is now on file," referring to the appraisal in the Creek County post judgment proceedings, in the amount of $405,000.00.

A new sale was held on July 22, 1970, at which the plaintiff Bank was the only bidder at $275,000.00, the required statutory two-thirds of the appraised price. The Bank moved to confirm and Carnes, Moore and Sports Diversified filed objections to this new sale. After hearing on August 3, 1970, the court refused to grant an oral motion for continuance and confirmed the sale from which appellants lodged Appeal No. 44132.

In reviewing the directed verdict for the Bank by the Tulsa County District Court in Appeal No. 43410 and the trial court's finding as a matter of law that the loan to Sports Diversified by the Bank was not usurious, we apply the usual standard: Neither we nor the trial court may weigh the evidence but we must disregard all conflicting evidence favorable to the demurrant or movant and accept as true all of the evidence favorable to the party against whom the motion is directed together with all inferences reasonably drawn therefrom. Andrews v. Aday, 380 P.2d 271 (Okla. 1963).

In directing the verdict against Sports Diversified, the trial court found that Sports Diversified was not a dummy corporation or a name under which Robert M. Moore, Jr., did business, but was a separate business entity. The trial court then found against Sports Diversified as a matter of law relying, in part, upon 18 O.S. 1961, 1.26, which forbade the defense or claim of usury to any corporation.

Since then, the Oklahoma Supreme Court has held this statute unconstitutional in the case of Sullivan v. Securities Inv. Co., 43 O.B.A.J. 885 (March, 1972). The Bank's attorney accedes to the consideration of this decision insofar as it may affect the rights of the parties in this case even though the unconstitutionality of 18 O.S. 1961, 1.26, was not urged in this case at the trial level and is raised for the first time on appeal. We, therefore, assume that Sports Diversified had standing to present the issue of usury and that the trial court's direction of a verdict cannot be supported solely on the basis that a corporation could not plead usury either affirmatively or defensively. This leaves only the question of whether the rate of interest exceeded ten percent per year, the maximum legal rate allowed the National Bank at the time this loan was made. 12 U.S.C. 1970, 85; Okla. Const., Art. XIV, 2; 15 O.S. 1961, 266.

We agree with the Bank that evidence of an oral agreement to extend the loan for two years, provided Sports Diversified made the interest payments and reduced the principal ten percent annually, did not violate the parole evidence rule and is competent evidence to be considered on the propriety of the ruling for the Bank on the usury question. This oral extension was simply a part of the overall agreement of which the note and loan fee check were also parts. The parties never purported to integrate the entire agreement into a complete writing or writings and consequently, it does not offend the parol evidence rule to permit evidence of the un-written part of the agreement. 15 O.S. 1961, 137; Spradlin v. American Travelers Ins. Co., 376 P.2d 323 (Okla. 1962).

Moore admitted that the two-year extension agreement was a part of his loan arrangement with the Bank on behalf of Sports Diversified. Consequently, we accept this fact as true in determining whether the trial court correctly decided that the agreement was not usurious as a matter of law.

It is the position of the Bank that the three percent loan fee was paid for the privilege of renewing the note for two years under this oral extension agreement and was not interest. There is substantial testimony in support of this interpretation from witnesses for the Bank. However, only the term "loan fee" was put on the check by the Bank's agent who made out the check except for its signature and account number and the testimony of plaintiff Moore supports a different interpretation:

"Q. (By Mr. Daniel) And the loan fee that was paid was for the reservation of those funds for an additional two-year period, wasn't it, Mr. Moore?

"A. That was not my understanding of it.

"Q. And you do feel that it has—It is susceptible of more than one understanding? A. Well, that's what we're here for to find out whether the loan fee is a fee or interest, and I claim it's interest.

"Q. But you claim it's susceptible of some other understanding as to what it might be, right? A. No I claim it's strictly interest."

And, earlier, on direct examination:

"Q. (By Mr. Young) Well, who wrote the word 'loan fee' there?

"A. Mr. Howell.

"Q. And who wrote the amount? A. Mr. Howell.

"Q. And that amount is what percentage of the $275,000.00? A. 3 percent.

"Q. Did Mr. Howell or anybody else for the National Bank of Commerce make any explanation at the time they required your signature on that check, what that loan fee was for? A. No, it's just a loan fee."

We think the above evidence was sufficient to present a factual question for the jury on the plaintiff's theory that the loan was usurious because the three percent loan fee was the equivalent of interest and, when added to the stated eight percent per year interest rate, amounted to eleven percent for the first year, one percent in excess of the maximum ten percent rate. The Bank argues that the burden was on the plaintiff to establish usury by clear and cogent proof, not merely by a preponderance of the evidence, and this position is supported by the authorities. Freed-Goodall Furniture Co. v. Morris Plan Co., 194 Okl. 556, 152 P.2d 902 (1944); Mondie v. General Motors Acceptance Corp., 178 Okl. 584, 63 P.2d 708 (1937). However, conflicting evidence favorable to the movant must be disregarded on a motion for directed verdict or demurrer to the evidence and the evidence favorable to the party against whom the motion is directed must be accepted as true together with all inferences reasonably drawn therefrom. Andrews v. Aday, supra. Viewing only the above-quoted testimony of plaintiff Moore (with all reasonable inferences to be drawn from it and disregarding all contradictory testimony as we must in deciding whether a verdict should have been directed) we think that it presents clear and cogent proof that the three percent loan fee was interest under another name. Whether it remains clear and cogent proof in the light of all the other evidence, is another matter. But, we cannot consider the contradictory testimony in deciding whether the trial court correctly directed a verdict that the agreement was not usurious as a matter of law. We can only consider the evidence favorable to the plaintiffs. So viewed, Sports Diversified met the minimum burden of proof to present a fact issue for the jury as to whether the loan fee was a cloak for additional interest or a fee for the two-year extension agreement. Basically, this is a question of the intent of the parties under the circumstances and is for decision by the jury on the conflicting evidence.

However, we think the trial court properly

directed a verdict against Robert L. Moore, Jr., individually. Usurious interest can be recovered only by the party paying it. 12 U.S.C. 1970, 86; 45 Am. Jur. 2d Interest and Usury 319 (1969). The evidence in this case established that the interest payments came ultimately from corporate funds. The trial court also correctly decided that Sports Diversified was a separate entity and not Moore's alter ego, even though there was some intermingling of corporate with personal funds.

The Bank argues that we should affirm the verdict and judgment on the note rendered by the Tulsa County District Court, even though we reverse the directed verdict against Sports Diversified on the issue of usury. The Bank says these matters are entirely unrelated and must be so treated because the Federal Statute, 12 U.S.C. 1970, 86, requires that the penalty for usury be recovered "in an action in the nature of an action of debt" and because this has been construed to require an independent action and not to permit setoff of the usury penalty against the amount of the unpaid note. However, the Federal cases so holding appear to antedate the adoption of the Federal Rules which became effective in 1940. E. G. McCollum v. Hamilton Nat. Bank, 303 U. S. 245, 58 S. Ct. 568 (1938). Since the effective date of the Federal Rules, the Court of Appeals for the Tenth Circuit has approved the offset of the penalty claim against the amount of the note; holding that the provisions of the Federal Rule on counterclaims (because the Federal Rules have the force of statutes) in effect have amended the provisions of 12 U.S.C. . 86 by implication. John R. Alley & Co. v. Federal Nat. Bank, 124 F.2d 995 (10 Cir. 1942). We must follow this decision instead of the others since it is binding on the Federal District Courts sitting in Oklahoma. It would be a curious result if a suitor could offset the penalty against the note in a case brought in Federal court in Oklahoma, but could not if the suit were commenced in the Oklahoma courts even though Oklahoma requires and allows setoff of money claims against money claims to substantially the same extent permitted by Federal Rule 13. 12 O.S. 1961, . . 273, 324. Moreover, we are bound by Federal decisions in the interpretation of Federal statutes, and this is the only Federal decision on the point we have found since the effective date of the Federal Rules. Of course, the amount of the interest charged *but unpaid* may be set off or credited against the principal of the note in any event, even under the earlier Federal decisions.

Plaintiffs also object in Appeal No. 43634 to rulings of the Tulsa County District Court in the appointment and reports of the receiver in that case. At the June 2, 1969, hearing on plaintiffs' motion to vacate the receivership and to confirm the receiver's reports, the plaintiffs declined to submit any proof or argument or to examine the receiver, his records, his accountant, or his attorney with respect to the final and supplemental reports (though given the opportunity to do so) because an expense item of $23,000.00 was presented to them for the first time by a supplemental report the day of the hearing. Plaintiffs' counsel did not request a continuance of the hearing with supporting data, but merely declined to proceed. Whereupon the Tulsa County trial court overruled the motion to vacate and confirmed the receiver's reports. We do not see what other reasonable alternative the court had since the burden was on the plaintiffs to justify their motion and objections and no justification was forthcoming.

Plaintiffs now renew their claim of error in the ruling of the court below but without authorities and with little argument. Plaintiffs allege that the report of the receiver's activities during his administration of the Raceway includes a recitation of all of the indebtedness owing by Sports Diversified, including its debt to the Bank represented by the Tulsa County judgment on the note, and therefore the order confirming the report should be reversed. We agree with the Bank that this recitation has little to do with the report and supplemental report which are principally concerned with the receiver's accounting for his administration of the assets of Sports Diversified. The order of the court merely confirms this administration and the accounting. Since no *proof* was presented by plaintiffs to cast any doubt on the receiver's administration, we affirm the order of the court confirming the reports and overruling the motion to vacate the receivership. Since the receiver's appointment and administration do not depend upon the outcome of the usury and note

claims and may stand approved whether Sports Diversified or the Bank is ultimately successful in the Tulsa County suit, we affirm the rulings of the trial court questioned in Appeal No. 43634 irrespective of the outcome of the retrial we have ordered in Appeal No. 43410.

We now consider the judgment of the Tulsa County District Court on the note and its order awarding an attorney's fee to the Bank's attorney, as provided in the note, and questioned in Appeal No. 43543. These judgments were arrived at after separate hearings in which appellants have shown no reversible error apart from the usury issue. Except for the credit based on the usury claim, plaintiffs were in default on the note. The award of $42,500.00 for an attorney's fee was based on evidence presented in an adversary hearing. The attorney for the Bank did not claim the twenty percent of the unpaid amount as authorized by the terms of the note but, instead, asked the court to fix a reasonable sum on proof of the work done and expert testimony. The amount of an attorney's fee is within the discretion of the trial court and is not to be disturbed on appeal unless the action of the court was arbitrary and unreasonable. Laster v. Laster, 370 P.2d 823 (Okla. 1962). We cannot say that the action was arbitrary in this instance.

Since the judgment on the note and the order awarding an attorney's fee in Appeal No. 43543 are interrelated with the usury issue in Appeal No. 43410, though free from error in themselves, we reverse them conditionally upon a verdict for the plaintiff, Sports Diversified, on the retrial of the usury claim. Otherwise, these orders stand affirmed.

The Creek County District Court, in establishing the priority of various liens against the War Bonnet Raceway property in foreclosing the Bank's mortgage from Sports Diversified, gave effect to the prior Tulsa County District Court judgment on the note and the usury charge as establishing the amount of indebtedness due the Bank secured by the mortgage and would not permit relitigation of these issues. Giving such effect to the final judgment of the Tulsa County District Court was proper, on principles of collateral estoppel as to those who were parties to the Tulsa County proceeding (Restatement, Judgments 69, 41, Comment d (1942); Restatement, Conflicts 2d 108, Comment 3, (1971)), and as establishing the operative fact of the amount of indebtedness to the Bank and the scope of its mortgage as to the lien holders, even though not parties to that Tulsa County litigation. Restatement, Judgments 111 (1942).

For reasons which we will detail later, we find no reversible error in the Creek County suit except that the judgment is based in part on the prior Tulsa County judgment which we now reverse. What is the consequence of this reversal on the Creek County District Court judgment? Restatement, Judgments 44 (1942) provides:

> "Where a judgment in an action is based upon a prior judgment, and the prior judgment is thereafter reversed, the judgment in the second action cannot be collaterally attacked, but it can be set aside by appropriate proceedings in that action +++"

We do not at this time know how the Creek County proceedings will be affected by the retrial and new judgment in the Tulsa County suit. This depends on the outcome of the Tulsa County retrial. Consequently, we do not now reverse the Creek County judgment merely because we have reversed the Tulsa County case since we find no defect in the Creek County suit except that it is based in part upon the reversed Tulsa County judgment. We merely remand this case to the Creek County District Court with directions to hold any further proceedings in abeyance until retrial and final judgment in the Tulsa County case. At that time, the Creek County District Court should give effect to the new Tulsa County judgment by taking such further action in the proceedings before it as are appropriate under the circumstances. The effect given to the new Tulsa County judgment should be the same as to all parties regardless of whether they were parties to the Tulsa County proceedings. Since Carnes was bound by the prior judgment, though not a party to it, it is as entitled as any party to take advantage of any change or modification in that judgment.

If the new verdict and judgment are the same in result as the old decision of the Tulsa

County District Court, then the Creek County Court may note the new judgment and ratify all prior proceedings without taking any new action. If the Tulsa County judgment is changed in result, the Creek County District Court may be able to accommodate the effect of the new judgment merely by modification of its former orders or it may be that the Tulsa County judgment on retrial will have such an impact on the Creek County case as to require a completely new trial. The District Court of Creek County will be governed accordingly.

We take this action instead of directly reversing the Creek County judgment in order to salvage as much of this Creek County proceeding as possible. This litigation has been long and expensive and we do not wish to extend it any further than necessary to correct errors.

Let us now consider why there is no other reversible error in the Creek County litigation. Error is claimed in the confirmation of the foreclosure sale and in the refusal of the trial court to set it aside on motion. Allegations of several irregularities in the proceedings leading up to the foreclosure sale were made, but only one has any support at all in the evidence presented at the hearing. While it was claimed that the objectors had insufficient time to prepare for this hearing, they concede that the trial judge was within his discretion in refusing them a continuance.

Objectors urge that the property was grossly under appraised and, therefore, was sold for a grossly inadequate consideration. This claim is based on alleged irregularities in the appriasal and on the disparity between the appraisal in Creek County of the property at $405,000.00 and the earlier appraisal in the Tulsa County case of $636,500.00. We think that the nature of this property made it very difficult to assess its market value. The charges of irregularity were not substantiated in any degree at the hearing except to show that the names of the appraisers were suggested to the sheriff by one of the attorneys. However, the sheriff testified that he chose them himself, and that they had served as appraisers in many other cases. There is no hint otherwise that they were biased or prejudiced or in any way influenced by anyone in their estimate of the value of the property. It was an irregularity for the attorney to suggest the names to the sheriff, but not of a sufficiently serious nature to overturn the confirmation of the foreclosure sale, nothing else appearing. It is well established that the confirmation or setting aside of a sale is addressed to the sound legal discretion of the trial court. There is no abuse of discretion in confirming a sale made in conformity with statute in the absence of fraud, unfairness or inadequacy of price so great as to shock the conscience of the court. Schave v. New York Life Ins. Co., 185 Okl. 554, 94 P.2d 892 (1939); Local Federal Sav. & Loan Ass'n v. Knie, 177 Okl. 633, 61 P.2d 635 (1936). We affirm the order of the Creek County trial court confirming the sale.

In Appeal No. 43410, the directed verdict for the Bank is affirmed against Robert M. Moore, Jr., but reversed on the usury question as relates to Sports Diversified. In Appeal No. 43634, relating to the receivership, the judgment is affirmed. The other appeals are remanded with directions to the courts below as to how to proceed dependent on the outcome of the retrial in Appeal No. 43410.

BAILEY, P.J., and
BOX, J., concur.

(Division No. 1)

HAMON, Appellant, v. ELLSWORTH BROS. TRUCK LINE, Inc., et al., Appellees.

No. 44892. Jan. 16, 1973.

(This Opinion Not to Be Considered as Precedent or Authority and Not for Publication in the Official Reporter)

Appeal from District Court, Creek County; Kenneth Hughes, Judge.

Reversed.

Jack B. Sellers, Sapulpa, for appellant.

Maurice Lampton, Sapulpa, and Watts, Looney, Nichols & Johnson, By: Burton J. Johnson, Oklahoma City, for appellees.

(Division No. 1)

SPORTS DIVERSIFIED, Inc., et al., Appellants, v. NAT'L BK. OF COMMERCE OF TULSA, Appellee.

Nos. 43410, 43543, 43634. April 10, 1973.

CARNES CONST. CO., et al., Appellants, v. MORGAN et al., Appellee.

No. 44132.

ORDER

The opinion filed herein on January 16, 1973, is hereby corrected by deleting pages 13, 14 and 15 of the typewritten opinion, and substituting in lieu thereof the attached new pages.

A separate Petition for Rehearing having been filed by National Bank of Commerce, Tulsa, Oklahoma; Sports Diversified, Inc.; and Robert M. Moore, Jr., each of said three Petitions for Rehearing are hereby considered refiled to the opinion as corrected, and each of said Petitions for Rehearing is hereby overruled.

DONE IN CONFERENCE this 10th day of April, 1973.

ROBERT L. BAILEY
Presiding Judge

sible error in the Creek County suit except that the judgment is based in part on the prior Tulsa County judgment which we now reverse. What is the consequence of this reversal on the Creek County District Court judgment? Restatement, Judgments § 44 (1942) provides:

"Where a judgment in an action is based upon a prior judgment, and the prior judgment is thereafter reversed, the judgment in the second action cannot be collaterally attacked, but it can be set aside by appropriate proceedings in that action + + +"

There is no other reversible error in the Creek County litigation. Error is claimed in the confirmation of the foreclosure sale and in the refusal of the trial court to set it aside on motion. Allegations of several irregularities in the proceedings leading up to the foreclosure sale were made, but only one has any support at all in the evidence presented at the hearing. While it was claimed that the objectors had insufficient time to prepare for this hearing, they concede that the trial judge was within his discretion in refusing them a continuance.

Objectors urge that the property was grossly under-appraised and, therefore, was sold for a grossly inadequate consideration. This claim is based on alleged irregularities in the appraisal and on the disparity between the appraisal in Creek County of the property at $405,000.00 and the earlier appraisal in the Tulsa County case of $636,500.00. We think that the nature of this property made it very difficult to assess its market value. The charges of irregularity were not substantiated in any degree at the hearing except to show that the names of the appraisers were suggested to the sheriff by one of the attorneys. However, the sheriff testified that he chose them himself, and that they had served as appraisers in many other cases. There is no hint otherwise that they were biased or prejudiced or in any way influenced by anyone in their estimate of the value of the property. It was an irregularity for the attorney to suggest the names to the sheriff, but not of a sufficiently serious nature to overturn the confirmation of the foreclosure sale, nothing else appearing. It is well established that the

confirmation or setting aside of a sale is addressed to the sound discretion of the trial court. There is no abuse of discretion in confirming a sale made in conformity with statute in the absence of fraud, unfairness or inadequacy of price so great as to shock the conscience of the court. Schave v. New York Life Ins. Co., 185 Okl. 554, 94 P.2d 892 (1939); Local Federal Sav. & Loan Ass'n v. Knie, 177 Okl. 633, 61 P.2d 635 (1936). We affirm the order of the Creek County trial court confirming the sale.

The record shows that Sports Diversified had paid interest in the amount of $24,899.89. Under 12 U.S.C.A. § 86 the most it can recover for usury is the sum of $49,799.78. This amount is not sufficient to require a setting aside of the mortgage forclosure judgment for the mortgage indebtedness would still exceed two-thirds of the appraised value of the real property involved. No deficiency judgment was sought or obtained.

The judgment in Appeal No. 44132, relating to foreclosure of the mortgage and sale of the property, is hereby affirmed.

In Appeal No. 43634, relating to the receivership, the judgment is affirmed.

In Appeal No. 43410, the directed verdict for the Bank is affirmed against Robert M. Moore, Jr., but reversed on the usury question as relates to Sports Diversified.

In Appeal No. 43543, the judgment on the note and for attorney fees is affirmed, subject to a reduction of the amount due the Bank if Sports Diversified is successful in a retrial of the usury question.

(Division No. 1)

BOHANAN et al., Plaintiffs, v. ATCHISON, TOPEKA and SANTA FE RY. CO., Defendant-Appellant.

AND

THOMAS CONCRETE PRODUCTS CO., Third-Party Defendant-Appellee.

No. 45134. April 17, 1973.

(This Opinion Not to Be Considered as Precedent or Authority and Not for Publication in the Official Reporter)

Appeal from District Court, Oklahoma County; Jack R. Parr, Judge.

Reversed and remanded.

Edd R. McNeil, Rainey, Welch, Wallace, Ross & Cooper, Oklahoma City, for appellant.

Ben A. Goff, Rhodes, Hieronymus, Holloway & Wilson, Oklahoma City, for third-party defendant-appellee.

ROMANG, J. The question is whether the trial court erred in sustaining a motion for judgment on the pleadings in a third party proceeding. We find that the sustaining of said motion was reversible error.

The original suit was filed by Frank Bohanan and Texas Oklahma Express, Inc., a corporation, as plaintiffs, against The Atchison, Topeka and Santa Fe Railway Company, a corporation, and Thomas Concrete Products Co., a corporation, as defendants. Reference will be made to the original defendants as Santa Fe and Thomas.

The original suit was for personal injury and property damages resulting from a truck-train collision in Oklahoma City, where South High Street intersects with the Santa Fe railroad.

Plaintiffs alleged various acts of negligence on the part of Santa Fe and Thomas, who each answered alleging various defenses. Santa Fe filed a cross-claim against Thomas seeking recovery from Thomas in the event plaintiff obtained a judgment against Santa Fe.

There was a license agreement between Santa Fe and Thomas whereby Thomas was permitted to use an area next to the Santa Fe railroad for the storage of concrete materials and the agreement contained an indemnification provision whereby Thomas indemnified Santa Fe against any loss as a result of such use.

In the original suit, Thomas filed a motion for summary judgment which was sustained and plaintiffs' petition was dismissed as to

Disposition by Supreme Court of Petitions for Certiorari

43634) Sports Diversified, Inc., and Robert M. Moore, J
v. National Bank of Commerce, Tulsa.

43410) Consolidated Same v. Same.

43543) Same v. Same

43132) Carnes Construction Co. and Robert M. Moore, J
v. David L. Morgan et al.

CERT. denied: Decision reported in 44 OBJ 261. Correction Ord
in 44 OBJ 1450.
All justices concur.

45357—Edna R. Wilson, now Edna R. Ziegler, v. Frank R. Shores, Executo
of Estate of Louis F. Wilson, Deceased.
CERT. denied: Decision reported in 44 OBJ 1132.
All justices concur.

STUDENT LEGAL RESEARCH SERVICE

The University of Oklahoma College of Law, through the Student Bar Association, has formed a permanent legal research service to do year round research for practicing attorneys. Student run, quality controlled work done at reasonable cost. Problems are presently being accepted. Your request should:

(1) state the pertinent facts,
(2) contain a suggestion of issues or topics to be explored (where possible),
(3) set a ceiling of cost (if you desire).

Cost per hour is $4.00 and includes all costs, including overhead and typing of the problem. Completed memorandums will be mailed within 14 days of receipt and all research will be done by students who have shown their capability by maintaining a high scholastic standard. All communications are held in strict confidence.

WRITE: LEGAL RESEARCH BOARD
BOX A
NORMAN, OKLA. 73069

DEFENDANT'S EXHIBIT

November 1, 1966

$ 275,000.00

TULSA, OKLAHOMA

On Demand or One (1) Year

AFTER DATE, WITHOUT GRACE, FOR VALUE RECEIVED, I, WE, OR EITHER OF US PROMISE TO PAY TO THE O

$13,750 due June 30, 1967 and $13,750 due ~~on March 31, 1967~~ October 20, 1967, Balance at matu

THE NATIONAL BANK OF COMMERCE OF TULSA

TWO HUNDRED SEVENTY FIVE THOUSAND AND NO/100---------- DO

NEGOTIABLE AND PAYABLE AT THE OFFICE OF THE NATIONAL BANK OF COMMERCE OF TULSA, IN TULSA, OKLAHOMA, TOGETHER WITH INTEREST FROM DATE AT THE

Eight PER CENT PER ANNUM ON THE UNPAID BALANCE PAYABLE Quarterly UNTIL DUE, AND INTEREST AT THE HIGHEST LAWFUL CONTRACT RAT

UNPAID PRINCIPAL AND INTEREST AFTER MATURITY UNTIL PAID. SHOULD ANY MAKER, ENDORSER, SURETY, OR GUARANTOR OF THIS NOTE EITHER COMMIT AN ACT OF BA

OR DIE, THE ENTIRE UNPAID BALANCE, TOGETHER WITH INTEREST, MAY BE DECLARED IMMEDIATELY DUE AND PAYABLE WITHOUT NOTICE AT THE OPTION OF THE HOLDER

THE MAKERS, ENDORSERS, SURETIES, GUARANTORS, AND ASSIGNORS SEVERALLY WAIVE PRESENTATION FOR PAYMENT, PROTEST AND NOTICE OF NON-PAYMENT OF THIS N

CONSENT AND AGREE TO ANY AND ALL EXTENSIONS OF THIS NOTE BEFORE OR AFTER MATURITY WITHOUT NOTICE, AND CONSENT AND AGREE TO PAY A REASONABLE AT

FEE OF TWENTY DOLLARS AND TWENTY PER CENT OF THE AMOUNT DUE, IF HANDED TO AN ATTORNEY FOR COLLECTION, TOGETHER WITH COSTS AND ALL OTHER EXP

INCURRED IN COLLECTING THIS NOTE OR ANY PART HEREOF.

COLLATERAL

SPORTS DIVERSIFIED, INC.

ADDRESS

BY: Robert M. Moore, Jr.
Robert M. Moore, Jr., President

NUMBER DUE

Robert M. Moore, Jr. Guar.

Jack B. Dearing, Jr. Guar.

NATIONAL BANK of COMMERCE

TULSA, OKLA., 11-1 1966

PAY TO THE ORDER OF National Bank of Commerce, Tulsa, Okla. $ 8,250.00

Eight Thousand Two Hundred Fifty Dollars and no/100 ——— DOLLARS

Sports Divisions, Inc.

ACCOUNT NO. 164-514-6

With - Robert D. Williams Jr

⑆106200064⑆

Loan Rec

Appendix C

IN THE DISTRICT COURT OF TULSA COUNTY, STATE OF OKLAHOMA

Sports Diversified, Inc., a corporation, and Robert M. Moore, Jr., et al,	)	
	)	Filed 4-22-69
Plaintiffs,	)	
vs.	)	
National Bank of Commerce of Tulsa, Oklahoma,	)	No. 115924
Defendant.	)	

JOURNAL ENTRY OF JUDGMENT

On this 26th day of February, 1969, the plaintiffs appearing in person and by their attorneys, Glenn A. Young and Earl W. Wolfe and the defendant appearing in person and by its attorneys, Sam P. Daniel, Jr. and Harry L. Seay, III of Doerner, Stuart, Moreland, Saunders & Daniel, and this cause having come on for trial in its regular order before a jury duly impaneled and sworn on the 19th day of February, 1969, said cause having been heard and recessed from day to day thereafter until this date, and both parties having rested at the conclusion of their evidence and both parties having moved the court for a directed verdict and the court after hearing the arguments of counsel thereon being fully advised in the premises directed the jury to enter a verdict in favor of the defendant, National Bank of Commerce of Tulsa, and against the plaintiffs and each of them and said jury so charged did enter its verdict in favor of the defendant and

against the plaintiffs and each of them.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED BY THE COURT that the plaintiffs have and recover nothing from said defendant and that the defendant have judgment plus its costs herein expended; to which judgment plaintiffs and each of them excepted and thereupon gave notice in open court of their intention to appeal to the Supreme Court of the State of Oklahoma.

s/Raymond W. Graham
RAYMOND W. GRAHAM
Judge of the District Court

* * * * *

IN THE DISTRICT COURT OF TULSA COUNTY, STATE OF OKLAHOMA

Sports Diversified, Inc., a corporation, Robert M. Moore, Jr., Jack S. Isaminger, Jr., and Emma C. Webb, Administratrix of the Estate of Floyd C. Webb deceased, Plaintiffs, vs. National Bank of Commerce of Tulsa, Oklahoma, Defendant.	)	Filed 4-22-69 No. 115924

JOURNAL ENTRY OF JUDGMENT

Now on the 15th day of April, 1969, this cause comes on for decision, Plaintiffs Sports Diversified, Inc. and Robert M. Moore, Jr. appearing in person and by their attorneys, Glenn A. Young and Earl W. Wolfe, and the Plaintiff Jack S. Isaminger, Jr. appearing by his attorney, Irvine E. Ungerman, and the Plaintiff Emma C. Webb, Administratrix of the Estate of Floyd C. Webb, deceased, appearing by and through her attorney, Robert Case, and the Defendant appearing in the person of one of its officers and by its attorney, Sam P. Daniel, Jr. of Doerner, Stuart, Moreland, Saunders & Daniel.

On the 25th day of March the Defendant's Counterclaim having come on for jury trial upon regular setting and on the Defendant Bank's combined Demurrer to and Motion to Strike the Plaintiff Sports Diversified Inc. and Robert M. Moore, Jr.'s Answer and Counterclaim filed herein on the 24th day of March, a jury having been duly called and in the process of voir dire examination by counsel for Plaintiff Sports Diversified, Inc. and Robert M. Moore, Jr., and upon the objection by Defendant of such examination to include any matters to which said combined motions were directed, and after hearing the arguments of counsel, and the presentation of authorities,

THE COURT FINDS that said combined Demurrer and Motionto Strike by the Defendant National Bank of Commerce of Tulsa to the Amended Answer and Counterclaim of Plaintiffs Sports Diversified, Inc., and Robert M. Moore, Jr., filed herein should be and the same are hereby sustained.

THE COURT FURTHER FINDS that the Plaintiff Robert M. Moore, Jr., individually, is not a party to said Counterclaim. The Court further finds that the Plaintiff Sports Diversified, Inc., an Oklahoma Corporation, is limited in its defense of said Counterclaim to a general denial in which the issue of tender may be raised.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the combined Demurrer and Motion to Strike the Plaintiff's Sports Diversified, Inc. and Robert M. Moore, Jr. Amended Answer and Counterclaim, be and the same are hereby sustained.

Whereupon, the Court asked counsel for Plaintiff Corporation if its proof on the issue of tender would be the same as that introduced at the earlier trial in this cause on the issue of usury only, and what if anything other than that introduced at the earlier trial would the Plaintiff present by way of denial of the amount due and owing under the note the subject of said Counterclaim. Whereupon, Plaintiff Sports Diversified, Inc., by and through its attorney, Glenn A. Young, stated that on the issue of the denial of the amount due and owing under the said note that the evidence on the issue of tender which he wished to present. Whereupon, the Court suggested and had the agreement of all counsel that an offer of proof of what the evidence Plaintiff might have on the issueof tender would be made out of hearing of the jury and if the same rose to such evidence as a matter of law on which reasonable minds could differ the jury would continue to be impaneled and to whom the issues would be submitted.

After hearing the stipulations of counsel and the various and sundry offers of proof which were by counsel for all sides agreed to be the full extent and nature of the testimony that they would present before the jury, including the incorporation by reference of certain parts of the record in the earlier trial of the other issues in this cause, the Court dismissed said jury.

Whereupon, counsel for Plaintiff Sports Diversified, Inc. and Robert M. Moore, Jr. inquired if the Court hold in abeyance its decision in this cause until the Report of Receiver could be filed herein and within ten days thereafter but not to extend beyond the 15th day of April, 1969, for the purpose of said Plaintiffs determining what amount of monies Defendant was claiming in order that they might be able to raise sums sufficient to pay the same. Whereupon, the Court took this cause under advisement until April 15, 1969, the day hereof.

THE COURT FINDS that on the 1st day of November, 1966, for value received, the Plaintiff Sports Diversified, Inc. made, executed and delivered to the Defendant National Bank of Commerce herein a promissory note in the principal sum of $275,000, payable on demand or in one year, together with interest thereon at a rate of 8% per annum, interest payable quarterly with two principal payments due in the sum of $13,750 each on June 30, 1967 and October 20, 1967, all in accordance with the terms and provisions of said note.

THE COURT FURTHER FINDS that on the same day, November 1, 1966, the Plaintiff

Jack S. Isaminger, Jr., for value received, and prior to its delivery, executed said note as a co-maker and that on the same day the deceased Floyd C. Webb, for value received and prior to the delivery of said note, did make, execute and deliver his individual unconditional guaranty thereof.

THE COURT FURTHER FINDS that on the same day, November 1, 1966, for and in consideration of a fee of $8,250, Defendant Bank agreed to and with Defendant Sports Diversified, Inc., that so long as it complied with the interest payments provided in said note and the principal reduction therein provided, all in accordance with the terms of said note, that it was committed to extend the due date of said note for an additional two years on the same terms.

THE COURT FURTHER FINDS that said note provided that in the event of default the unpaid principal and interest thereunder would bear interest at the rate of 10% per annum and that in the event of default if said note were placed in the hands of an attorney for collection it would carry an attorney's fee of 20% of the unpaid balance thereof. The court finds that Defendant Bank was forced to and did in fact place said note in the hands of its attorney, Sam P. Daniel, Jr., of Doerner, Stuart, Moreland, Saunders & Daniel, for collection.

THE COURT FURTHER FINDS that the Plaintiff Sports Diversified, Inc. did default in the payment of principal and interest due under said note and that the unpaid principal sum thereof, together with interest and attorney's fee therein

provided, is due and owing Defendant Bank as of the date hereof in the principal sum of $261,250, together with interest thereon from and after the 2nd day of August, 1967, to and including the 20th day of October, 1967, at the rate of 8% per annum, for a total of $265,830.80 and interest on said last figure at the rate of 10% per annum from and after October 20, 1967, to and including the 15th day of April, 1969, in the amount of $39,546.69, for a total principal and interest due and owing under said note of $305,377.49.

THE COURT FURTHER FINDS after hearing testimony and evidence on the question of the reasonableness of the attorney's fees provided in said note and the arguments of counsel with respect thereto, that the attorney for Defendant National Bank of Commerce of Tulsa is entitled to an attorney's fee of $42,500, which the Court finds to be reasonable. The Court further finds that the Defendant National Bank of Commerce of Tulsa is entitled to its costs herein expended in the amount of $202.20, all as more particularly set forth in the Affidavit-Bill of Costs filed herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Defendant National Bank of Commerce of Tulsa have and receive of and from Plaintiffs Sports Diversified, Inc., Jack S. Isaminger, Jr., and Emma C. Webb, Administratrix of the Estate of Floyd C. Webb, Deceased, jointly and severally, judgment in the sum of $305,377.49, together with interest at the rate of 10% per annum on $265,830.80 from this date until paid, and judgment against said Plaintiffs jointly and severally in the further sum of

$42,500 as attorney's fees with interest thereon at the rate of 10% per annum from this date until paid, and costs hereof in the amount of $202.20 and accruing costs, for all of which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Plaintiffs, Sports Diversified, Inc., Jack S. Isaminger, Jr., and the said Emma C. Webb, Administratrix, said note and guaranty are hereby cancelled and merged into this judgment.

s/Raymond W. Graham
Judge of the District Court

* * * * *

IN THE DISTRICT COURT IN AND FOR CREEK COUNTY, STATE OF OKLAHOMA

National Bank of Commerce of Tulsa, Plaintiff, vs.	)	
Sports Diversified, Inc., a corporation, Ainslie Perrault, Business Builders, Inc., a corporation, Robert M. Moore, Jr., and Billie Jeraldine Moore, Defendants.	)	Filed 3-16-70
	)	No. 35423
Carnes Construction Company, a corporation, Glenn A. Young and David L. Morgan, Receiver, Intervenors.	)	

JOURNAL ENTRY OF JUDGMENT

This cause coming on regularly for hearing this 2nd day of March, 1970, pursuant to regular assignment and setting, the Court having taken the same under advisement, each of the parties hereto having been present by and through their respective attorneys, to wit: Intervenor Glenn A. Young, pro se; Defendant Business Builders, Inc. by its attorney, Bill Wilson; Defendant Sports Diversifed, Inc by its attorney, Glenn A. Young; Intervenor Carnes Construction Company, by its attorney, Jim Groves; Defendant Ainslie Perrault by his attorney, Irvine Ungerman; Intervenor David L. Morgan, Receiver, by his attorney, Sam P. Daniel, Jr.; Plaintiff National Bank of Commerce of Tulsa by its attorney, Sam P. Daniel, Jr.; and Defendants Robert M. Moore, Jr. and Billie Jeraldine Moore by their attorney, Glenn A. Young; and it appearing to the Court that this is a suit by various note, mortgage and mechanic's and materialmen's lien claimants for the foreclosure of their respective mortgages and liens to satisfy certain indebtedness and a determination of the priority thereof upon the real property and improvements thereon securing the same and againstwhich their liens are asserted, located in Creek County, State of Oklahoma, sometimes known as War Bonnet Raceway, more particularly described as follows:

> All of Section 4, Township 19 North, Range 9 East, Excepting the Southeast Quarter of the Southeast Quarter (SE/4 SE/4) thereof, and further excepting a strip of land not to exceed 330 feet in width along the western

of the Northwest Quarter thereof, and further excepting a strip of land not to exceed 330 feet in width along the eastern boundaries of the Northeast Quarter and along the Northeast Quarter of the Southeast Quarter of said Section 4; and further excepting a tract consisting of 2.41 acres in the Northwest Quarter thereof; and subject to existing government easements. LESS AND EXCEPT: All oil, gas and other mineral rights, and LESS and EXCEPT the West 25 feet of the East 355 feet of the Northeast Quarter of said Section 4 and the West 25 feet of the East 355 feet of the Northeast Quarter of the Southeast Quarter (NE/4 SE/4) of Section 4, all in Township 19 North, Range 9 East, Creek County, Oklahoma,

The West Half of the Northwest Quarter (W/2 NW/4) of Section 9, Township 19 North, Range 9 East, LESS AND EXCEPT: All oil, gas and other mineral rights,

The Northeast Quarter of Section 9, Township 19 North, Range 9 East, EXCEPTING a strip of land not to exceed 330 feet in width along the eastern boundary thereof from the northern boundary extending to a point of location 100 feet north of the southern boundary thereof, and further Excepting a tract con-

sisting of 9.38 acres in the Northeast corner of Section 9, and subject to existing government easements. LESS AND EXCEPT: All oil, gas and other mineral rights,

The East Half of the Northeast Quater (E/2 NE/4) of Section 8, Township 19 North, Range 9 East, LESS AND EXCEPT: All oil, gas and other mineral rights, and

That part of the East Half of the Southeast Quarter (E/2 SE/4) of Section 8, Township 19 North, Range 9 East, lying north of the north right of way line of the Frisco Railroad, LESS AND EXCEPT: All oil, gas and other mineral rights.

The Court, having heard the testimony of all witnesses sworn in open Court, together with the review of all of the documentary evidence, including the various notes, mortgages, judgments, orders, and mechanics' and materialmen's liens, and being fully advised in the premises, finds as follows:

1. The Court finds that David L. Morgan, Receiver, has established the allegations in his Petition in Intervention, i.e., that there is due from Sports Diversified, Inc. to David L. Morgan, Receiver, on a judgment entered June 2, 1969, by the District Court of Tulsa County, in Cause No. 115924, styled Sports Diversified, Inc., et al, v. National Bank

of Commerce of Tulsa, the following sums arising out of the receivership of said Sports Diversified, Inc. superintended by said Court, to wit:

Unreimbursed expenses owned (sic) to Receiver	$ 875.70
Receiver's Fee	3,000.00
Accounting Fees	400.00
Receiver's Attorney's Fees	900.00
TOTAL	$ 5,175.70

and in addition the sum of $45,078.33 owing on unpaid Receiver's certificates authorized by said court in the course of said receivership, all as specified in said Judgment. The Court finds that said Judgment has been appealed, but not superseded. The Court further finds that with respect to the amounts due and owing under said Judgment, that David L. Morgan, Receiver, has a lien upon the land and improvements above described by virtue of said Judgment and is entitled to foreclosure of the same. The Court further finds that with respect to the priority of such lien, the amounts due and owing for the unpaid Receiver's expenses, Receiver's fee, accountant's fee and Receiver's attorney's fee, totalling $5,175.70, constitute a lien on the land and improvements first, prior and superior to the liens of all other parties hereto and herein established, and that with respect to the amounts owning on said unpaid Receiver's certificates, that the same constitute a lien on the land and improvements subordinate and inferior to the liens of all other parties hereto and herein established, and is entitled to foreclosure on the same.

2. The Court finds that by virtue of an Order Fixing Trustee's Costs, Attorney's Fees and Dismissing Proceedings dated December 9, 1970, and Order Nunc Pro Tunc correcting the same dated February 24, 1970, In Proceedings for the Reorganization of a Corporation No. 69-B-849, in the Matter of Sports Diversified, Inc. to the recipients therein named, Alfred R. "Bill" Tandy, et al, the total sum of $5,086.60 as fees and expenses arising out of the corporate reorganization of Sports Diversified, Inc., all as specifically set forth therein. The Court further finds that Alfred R. "Bill" Tandy, et al (exclusive of Glenn A. Young, Attorney for the Debtor Corporation, Sports Diversified, Inc.) have a co-equal lien upon the land and improvements above described by virtue of said Order in the total amount of $4,336.60, inferior and subordinate only to the lien of David L. Morgan, Receiver, set forth above, and are entitled to foreclosure on the same.

3. The Court further finds that the National Bank of Commerce of Tulsa has established the allegations of its pleadings herein, i.e., that the note which was secured by the mortgage (as corrected) on the described premises was reduced to judgment in the District Court of Tulsa County on April 15, 1969, in Cause No. 115924, styled Sports Diversified, Inc., et al, v. National Bank of Commerce of Tulsa, and that there is due from the said Sports Diversified, Inc. on said judgment and mortgage, the sum of $347,877.49, with interest thereon at the rate of ten per cent (10%) per annum from April 15, 1969, as specified therein. The Court finds that said judgment has been appealed but

not superseded. The Court further finds that said Bank has released from said mortgage the following described tract, to wit:

> The West 25 feet of the East 355 feet of the Northeast Quarter (NE/4) of said Section 4, and the West 25 feet of the East 355 feet of the Northeast Quarter of the Southeast Quarter (NE/4 SE/4) of Section 4, Township 19 North, Range 9 East.

The Court further finds and adjudges that the National Bank of Commerce of Tulsa has a first and prior lien upon the land and improvements first above described by virtue of its mortgage as security for the payment of the indebtedness set forth in said judgment, inferior and subordinate only to the in favor of David L. Morgan, Receiver, and Alfred R. "Bill" Tandy, et al, all as more particularly described above; that the National Bank of Commerce of Tulsa is entitled to foreclosure of said Mortgage to secure the aforesaid judgment. The Court further finds that the mortgage owned, held and sued upon by the plaintiff, National Bank of Commerce of Tulsa, expressly waives appraisement or not at the option of the owner and holder thereof and that the plaintiff elects to have said property sold with appraisement.

4. The Court further finds that Business Builders, Inc. has established the allegations of its pleadings herein, i.e., that there is due from Sports Diversifed, Inc. to Business Builders, Inc. on a judgment entered May 1, 1967, against said Sports Diversified, Inc. in

the amount of $613.34 with interest thereon at the rate of six per cent (6%) per annum from December 1, 1966, as specified therein, together with an attorney's fee of $200.00 as in said judgment provided. The Court further finds that by virtue of said judgment, Business Builders, Inc. has a lien upon the land and improvements first above described together with that tract released by the National Bank of Commerce of Tulsa, which the Court finds was not conveyed out by Sports Diversified, Inc., until after said judgment lien attached, subordinate and inferior only to the liens of David L. Morgan, Receiver, Alfred R. "Bill" Tandy, et al, and the National Bank of Commerce of Tulsa as set forth above; and is entitled to foreclosure of the same.

5. The Court further finds that Ainslie Perrault has established the allegations of his pleadings herein, i.e., that there is due from defendant, Sports Diversified, Inc., Robert M. Moore, and Billie Jeraldine Moore to the said Ainslie Perrault on the note and mortgage executed and delivered by them to said Ainslie Perrault covering the land and premises first above described together with that tract released by the National Bank of Commerce of Tulsa, the sum of $16,350.00, with interest thereon at the rate of ten per cent (10%) per annum from July 23, 1967, as therein specified, together with a reasonable attorney's fee of $1,645.00. The Court further finds that by virtue of said mortgage as security for the payment of said indebtedness, interest and attorney's fees, said Ainslie Perrault has a lien upon the land and improvements above described, together with that last released by National Bank of Commerce of

Tulsa which the Court finds was not conveyed out by Sports Diversified, Inc. until after said mortgage lien attached, subordinate and inferior only to the liens of David L. Morgan, Receiver, Alfred R. "Bill" Tandy, et al, the National Bank of Commerce of Tulsa, and Business Builders, Inc., set forth above and is entitled to foreclosure of the same.

6. The Court further finds that the Intervenor, Carnes Construction Company, has in part established the allegations of its pleadings herein, i.e., that there is due and owing from Sports Diversified, Inc. to Carnes Construction Company the sum of $77,118.72 with interest thereon at the rate of six per cent (6%) per annum from November 3, 1967, and a reasonable attorney's fee in the amount of $7,700.00 by virtue of the performance of certain work and the delivery of certain materials under a contract with the defendant, Sports Diversified, Inc., and used in the construction of buildings and other improvements on the land and premises described above; and that the said Intervenor, Carnes Construction Company, within the time prescribed by law, filed with the Court Clerk of Creek County, its verified lien statement as alleged and set out in its pleadings herein. The Court further finds that by virtue of said indebtedness, Carnes Construction Company has a lien upon the land and improvements first above described together with that last released by the National Bank of Commerce of Tulsa which the Court finds was not conveyed out by Sports Diversified, Inc. until after said mechanic's and materialmen's liens attached, subordinate and inferior only to the liens of David L. Morgan, Receiver, Alfred

R. "Bill" Tandy, et al, the National Bank of Commerce of Tulsa, Business Builders, Inc., and Ainslie Perrault as set forth above, and is entitled to foreclosure of the same.

7. The Court further finds that the records of the County Clerk of Creek County show that Bill Story Fire & Equipment Co. in Cause No. 54298 in the Common Pleas Court of Oklahoma County secured a judgment against the defendant, Sports Diversified, Inc., in an amount of $1,346.07, which was entered November 25, 1968, and that there is due and owing from said Sports Diversified, Inc. on said judgment the sum of $1,346.07, which was entered November 25, 1968, and that there is due and owing from said Sports Diversified, Inc. on said judgment the sum of $1,346.07 plus interest at the rate of six per cent (6%) per annum from November 14, 1968, together with an attorney's fee of $450.00, as specified therein. The Court further finds and adjudges that Bill Story Fire & Equipment Co. has a lien upon the land and improvements first above described by virtue of said judgment for the payment of the indebtedness set forth therein, inferior and subordinate to the liens of David L. Morgan, Receiver, Alfred R. "Bill" Tandy, et al, the National Bank of Commerce of Tulsa, Business Builders, Inc., Ainslie Perrault and Carnes Construction Company as set forth above.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That David L. Morgan, Receiver, have judgment against the defendant, Sports

Diversified, Inc., for the sum of $5,175.70 with interest at the rate of ten per cent (10%) per annum from the 2nd day of June, 1969, until paid, the same constituting amounts due and owing for Receiver's expenses, Receiver's fee, accountant's fee, and Receiver's attorney's fee, and that the said amount constitutes a first, prior and superior lien upon the land and improvements located in Creek County, Oklahoma, described above.

2. That the following named persons have judgments against the defendant, Sports Diversified, Inc., for the sums set opposite their names, to wit:

Alfred R. "Bill" Tandy	$ 446.60
Sherwood Johnston	500.00
James O. Ellison	1,530.00
Joe M. Holliman	1,860.00
Glenn A. Young	750.00

and that said amounts, except the $750.00 owed to Glenn A. Young, constitute a co-equal, second lien upon the land and improvements located in Creek County, Oklahoma, described above.

3. That the National Bank of Commerce of Tulsa have judgment against the defendant, Sports Diversified, Inc., for the sum of $347,877.49 with interest thereon at the rate of ten per cent (10%) per annum from the 15th day of April, 1969, until paid, and for its costs herein expended, and that said amounts are secured by its mortgage and constitute a third lien upon the land and improvements located in Creek County, Oklahoma, above described.

4. That Business Builders, Inc. have judgment against the defendant, Sports Diversified, Inc. for the sum of $613.34 at the rate of six per cent (6%) per annum from the 1st day of December, 1966, until paid and a further sum of $200.00 attorney's fees and that said amounts constitute a fourth lien upon the land and improvements located in Creek County, Oklahoma, described above.

5. That Ainslie Perrault have judgment against the defendant, Sports Diversified, Inc., Robert M. Moore, Jr., and Billie Jeraldine Moore for the sum of $16,350.00 with interest at the rate of ten per cent (10%) per annum from the 23rd day of July, 1967, until paid and for the further sum of $1,645.00 attorney's fees and for all of his costs herein expended and that said amounts secured by his mortgage constitute a fifth lien upon the land and improvements located in Creek County, Oklahoma, described above.

6. That Carnes Construction Company have judgment against the defendant, Sports Diversified, Inc., for the sum of $77,118.72 with interest at the rate of six per cent (6%) per annum from the 3rd day of November, 1967, and a further sum of $7,700.00 attorney's fee and for its costs herein expended and that such amounts constitute a sixth lien upon the land and improvements located in Creek County, Oklahoma, described above.

7. That David L. Morgan, Receiver, have judgment against the defendant, Sports Diversified, Inc., for the sum of $45,078.33 with interest at the rate of ten per cent (10%) per

annum from the 2nd day of June, 1969, until paid, the same constituting the amounts due and owing under the unpaid receiver's certificates, and that such amount is a seventh lien upon the land and improvements located in Creek County, Oklahoma, described above.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the mortgages and liens of the parties herein in the amounts hereinabove found and adjudged be foreclosed and a special execution and order of sale issue out of the office of the District Court Clerk in this cause directed to the Sheriff to levy upon, advertise, and sell, after due and legal appraisement, the land and improvements and premises hereinabove described, subject to unpaid taxes, if any, and to pay the proceeds of said sale to the Clerk of this Court, as provided for at law, for application as follows:

First, to the payment of the costs herein accrued and accruing.

Second, to the payment of the judgment and lien of David L. Morgan, Receiver, for unpaid Receiver's expenses, and Receiver's accountant's and attorney's fees.

Third, in the payment of the Order and lien of the United States District Court for the Northern District of Oklahoma in Proceedings for the reorganization of a Corporation, No. 69-B-849 in the Matter of Sports Diversified, Inc., Debtor, dated December 9, 1969, as corrected by order Nunc Pro Tunc dated February 24, 1970, and in the amount of $4,336.60.

Fourth, to payment of the judgment and lien of the National Bank of Commerce of Tulsa.

Fifth, to the payment of the judgment and lien of Ainslie Perrault.

Sixth, to the payment of the judgment and lien of Ainslie Perrault.

Seventh, to the payment of the lien of Carnes Construction Company.

Eighth, to the payment of the judgment and lien of David L. Morgan, Receiver, for unpaid Receiver's certificates.

Ninth, the balance, if any, to be paid to the Clerk of this Court, to await the further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that from and after the confirmation of said sale of said land and improvements above described, under and by virtue of this judgment and decree, said defendants and intervenors and each of them, and all persons claiming under them since filing of the Petition of the plaintiff herein, be and each of them are forever barred, foreclosed, and enjoined from asserting or claiming any lien or right, title, interest, estate or equity in or to said land and improvements, or any part thereof.

s/Kenneth Hughes
District Judge

Certificate of Service

The undersigned attorney of record for the petitioners herein, Sports Diversified, Inc. and Robert M. Moore, Jr., hereby certifies that on the 11 day of August, 1973, in compliance with Rule 33(1) of the Rules of the Supreme Court of the United States, three copies of the foregoing Petition for Writ of Certiorari were deposited in the United States Post Office at Tulsa, Oklahoma, with first class postage prepaid, addressed to the following counsel of record at their post office addresses as shown:

Sam P. Daniel Jr., Attorney for the National Bank of Commerce of Tulsa and David L. Morgan, 1200 Atlas Life Building, Tulsa, Oklahoma 74103.

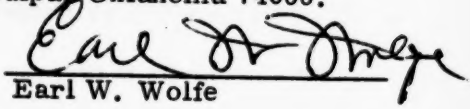
James D. Groves, Attorney for Carnes Construction Co., 3223 East 31 Street, Tulsa, Oklahoma 74114.

Irvine E. Ungerman, Attorney for Jack S. Isaminger and Ainslie Perrault, Wright Building, Tulsa, Oklahoma 74103.

Robert Case, Attorney for Emma Webb, Fourth National Bank Building, Tulsa, Oklahoma 74119.

Bill Wilson, Attorney for Business Builders, Inc., 16 East Lee, Sapulpa, Oklahoma, 74066.

Glenn A. Young, Pro Se, P. O.
Box 486, Sapulpa, Oklahoma 74066.



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IN THE
SUPREME COURT OF THE UNITED STATES

No. 73-291

OCTOBER TERM, 1973

SPORTS DIVERSIFIED, INC. a corporation, and ROBERT M. MOORE, JR.,
Petitioners,

vs.

NATIONAL BANK OF COMMERCE OF TULSA, OKLAHOMA, CARNES CONSTRUCTION CO., DAVID L. MORGAN, AINSLIE PERRAULT, BUSINESS BUILDERS, INC., BILLIE GERALDINE MOORE, GLENN A. YOUNG, JACK S. ISAMINGER and EMMA WEBB, Administratrix of the Estate of FLOYD C. WEBB, Deceased,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

SAM P. DANIEL, JR.
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1200 Atlas Life Building
Tulsa, Oklahoma 74103

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 73-291

OCTOBER TERM

SPORTS DIVERSIFIED, INC. a corporation, and ROBERT M. MOORE, JR.,
Petitioners,

vs.

NATIONAL BANK OF COMMERCE OF TULSA, OKLAHOMA, CARNES CONSTRUCTION CO., DAVID L. MORGAN, AINSLE PERRAULT, BUSINESS BUILDERS, INC., BILLIE GERALDINE MOORE, GLENN A. YOUNG, JACK S. ISAMINGER and EMMA WEBB, Administratrix of the Estate of FLOYD C. WEBB, Deceased,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Respondent, National Bank of Commerce, hereby opposes the Petition for Writ of Certiorari to the Oklahoma Supreme Court. The Respondent is satisfied with the matters contained in the Brief of the Petitioners in relation to Opinions Below, Jurisdiction, and Constitutional Provisions, Statutes, and Regulations Involved. Except with respect to the question raised herein by

Respondent as to the propriety in granting the Writ in the first instance, the Respondent is essentially satisfied with the Petitioner's statement of the Questions Presented For Review insofar as they point up the issues. The Respondent is satisfied with the Statement of the Case except for the omission of certain facts which are germane to the state court decision and whether or not there is any merit in reviewing its decision, namely,

1. The Oklahoma Statute denying to a corporation the right to claim or defend on any usury grounds on the basis of which the Tulsa County Court directed a verdict against Sports Diversified on its suit for the usury penalty and struck usury from its defense in the bank's suit on the note had been the codified law in Oklahoma for 25 years. 1/ It was only after the appeals from both the Creek County foreclosure judgment and the Tulsa County judgment on the note had been perfected that the Oklahoma Supreme Court struck the statute down as unconstitutional in a case wholly unrelated to the instant one.

2. It was not possible for the bank to foreclose its mortgage on the land which secured its note in the same action involving the suit on the note as the land was in another county. Under Oklahoma statutory law foreclosure must be instituted in the county where the land is located. 2/

1/ 18 O.S. 1971 §1.26

> "**§1.26 Usury no defense.**--No corporation shall, after this Act becomes effective, plead, directly, or by counter claim, set-off, or otherwise, a defense of usury to any action brought against it to recover damges on, or of any other remedy on, any debt, mortgage, bond, bill of exchange, note or other obligation or liability executed, incurred or effected by such corporation."

2/ 12 O.S. 1971 §131

3. The $275,000 bank loan was made to Sports Diversified only. The record shows that all proceeds from the loan less amounts paid out at the time it was funded were deposited to Sports Diversified's corporate bank account. The other signers on the note were accommodation makers only. [3/]

4. The action by the bank on its note was a counterclaim and not a cross-petition in that the bank, as Defendant sued the Plaintiff.

5. Neither of the Petitioners herein perfected an appeal from the judgment of the Creek County Court foreclosing the bank's mortgage (at that time securing the Tulsa County judgment on the note) and the liens of various other creditors of Petitioners. Moreover, although perfecting an appeal from the Tulsa County court judgment on the note Petitioners elected not to post supersedeas to stay the effectiveness of this judgment, failing which the judgment could be executed and satisfied. [4/] It was this fact that permitted the Creek County court to foreclose the mortgage then securing the judgment into which the note had been merged. [5/]

6. Whether the loan transaction between the Petitioners and the bank was tainted with usury or not, i.e., whether the $8,250.00 "loan fee" paid by Sports Diversified to the bank in addition to the agreed 8% on the note constituted a rate of interest in excess of the 10% per annum legal rate (as contended by the Petitioners) or whether such fee was for a two year ex-

3/ 12A O.S. 1971 §3-415

4/ 12 O.S. 1971 §968

5/ **Latson** v. **McCollom**, 192 Okla. 48, 134 P.2d 130 (Okla) 1943

tension of the note conditioned upon interest and certain annual principal payments and thereby over the agreed term of the loan (3 years) less than 10% per annum (as contended by the bank) has yet to be determined. The "judgment" of the Oklahoma Supreme Court is not final as to this issue.

7. Of all of the parties named in the style of this Application including Respondent lien claimants, Carnes Construction Co., Ainslie Perrault and Business Builders, Inc. whose liens were adjudged inferior to the Bank's note judgment, and including Respondent Jack S. Isaminger, against whom, as guarantor of the Bank's note, the Tulsa County judgment was also entered, only Petitioners completed their appeal through the Oklahoma Supreme Court, by the requisite Petition for Rehearing in the Oklahoma Court of Appeals and subsequent Petition for Certiorari in the Oklahoma Supreme Court for a review of the Court of Appeals decision. 6/

QUESTIONS PRESENTED FOR REVIEW

1. Are all or any one of the enumerated rulings of which Petitioners complain and which are embodied in the Oklahoma Court decision of a nature to justify the granting of a Writ of Certiorari?

ARGUMENT

The case presented by Petitioners is not an appropriate case for the granting of a Writ of Certiorari. The questions either concern themselves with the state court's application and interpretation of state law and not

6/ Title 12 O.S. 1971, Ch. 15, App. 3, Rules of Practice and Procedure in the Court of Appeals and on Certiorari to that Court.

federal questions of substance, *Wolf* v. *Weinstein*, 372 U.S. 633, 83 S.Ct. 969, 10 L.Ed. 2d 33; seek a review and reversal of decisions based solely on questions of fact, *National Labor Relations Board* v. *Waterman S.S. Corp.*, 309 U.S. 206, 60 S.Ct. 493, 84 L.Ed. 704 and *United States* v. *Johnson*, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 or addresses itself to issues of a purely personal and private nature, of no public interest and importance, *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922.

Moreover, every issue on which Petitioners base their application for Writ is predicated upon the assumption that the loan transaction between the Petitioners and the bank was usurious in violation of the Federal Statutes. That issue has yet to be determined by the trial court under the mandate of the Oklahoma Court remanding that issue to the lower court for trial. This court has held that a judgment must end the litigation by fully determining the rights of the parties so that nothing remains to be done by the trial court except the ministerial act of entering the judgment. *Annotation* 29 L.Ed. 2d 872. This is not the case. It seems apparent that the instant case stands outside of the perimeters established by this court for exercising its very narrow discretion in granting writs of certiorari.

Petitioners make no claim that the state court procedures of which they availed themselves to protect their interests did not afford them due process. They only complain of unfavorable rulings. We shall hereinafter address our response to each in the order they were numbered and presented in Petitioner's brief.

1. The Directed Verdict Against Petitioner Robert M. Moore, Jr. In the Usury Penalty Suit.

This is an evidentiary issue only, not involving any

misapplication or misinterpretation of Federal law. It was a fact question only as to whether Petitioner Moore had paid any of the interest. Assuming the transaction was usurious, if he did not he was not entitled to recovery of any usury penalty. 7/ In its decision the Oklahoma Court of Appeals upheld the trial court on this evidentiary issue,

> "However, we think the trial court properly directed a verdict against Robert L. Moore, Jr., individually. Usurious interest can be recovered only by the party paying it. 12 USC 1970 §86; 45 Am. Jur. 2d, Interest and Usury 319 (1969). The evidence in this case established that the interest payment came ultimately from corporate funds." (pet. Br. App. A, p. 77-79)

2. The Refusal Of The Tulsa County And Creek County Courts To Permit Petitioners To Raise As A Defense In The Action On The Note The Forfeiture Of The Interest Not Paid But Reserved.

First, with respect to Robert M. Moore, Jr. the individual Petitioner, he was denied nothing because long before the Tulsa County trial on the bank's note took place the counterclaim was dismissed as against Robert M. Moore, Jr. He was not being sued for any of the principal or any of the interest on the note.

Second, with respect to the Creek County District Court's refusal to permit both petitioners to raise the defense of usurious interest forfeiture in the mortgage foreclosure we must point out that the Creek County Court was presented with a judgment into which the

7/ **Talbot** v. **Sioux City First National Bank of Iowa**, 185 U.S. 172. 22 S.Ct. 612. 46 L.Ed. 857. **First National Bank of Mill Creek** v. **Ellis**, 27 Okla. 699, 114 Pac. 620 (1911).

Promissory Note had been merged and in which the same usury issue among the same parties had been ruled upon by the Tulsa County District Court. The Tulsa County judgment was res judicata on this issue. 8/ Moreover, since the Tulsa County judgment was appealed, to have done so would have gone behind the Tulsa County judgment in a prohibited collateral attack on that judgment seeking to affect the rights of the parties while jurisdiction was then exclusively in the Oklahoma Supreme Court. This is not permitted under Oklahoma Law. 9/

Third, with respect to the Petitioner corporation the record clearly demonstrates that it has not been denied its right to claim unpaid interest forfeiture. The Oklahoma Court reversed the judgment on the note conditionally upon a retrial of the usury issue and according to the court's own statement in the event the Petitioners would prevail the amount of the Tulsa County judgment on the note would be adjusted accordingly. 10/ The Court said,

> "Of course, the amount of the interest charged *but unpaid* may be set off or credited against the principal of the note in any event, even under the earlier Federal decisions." (Pet. Br. App. A, p. 78)

* * *

8/ **Chapman** v. **Tiger**, 356 P.2d. 571 (Okla. 1960).

9/ **Short** v. **Chaney**, 66 Okla. 258, 168 Pac. 425 (1917).

10/ The unpaid interest at the 8% rate reserved in the note to October 31, 1967, the date Petitioners filed their action, was $5,225. This amount was included in the Tulsa County judgment.

> "Since the judgment on the note and the order awarding an attorney's fee in Appeal No. 43410, though free from error in themselves, we reverse them conditionally upon a verdict for the plaintiff, Sports Diversified, on the retrial of the usury claim. Otherwise, these orders stand affirmed." (Pet. Br. App. A, p. 79)

Of course, the question of whether the note should be reduced by the amount of interest reserved but unpaid awaits the decision of the trial court, upon the retrial of the usury question.

3. The Tulsa County Court Granting Judgment For Interest On The Note From The Date Of Suit On The Note At The Contract Rate Of Ten Percent Per Annum.

Petitioners contend that this violates Federal law; that only the legal rate can be collected after suit is instituted and that the legal rate in Oklahoma is six (6%) percent per annum.

This issue was never raised by the Petitioners at any level of the proceedings in any court below including the Oklahoma Court of Appeals and Oklahoma Supreme Court. It is not mentioned in any of the pleadings at the trial level, in the Petitions in Error in which the decisions of the trial court were appealed nor in any of the briefs submitted by petitioners. It was raised for the first time in Petitioners oral argument before the Court of Appeals. Apparently, the Oklahoma Court of Appeals adhered to the well settled authority in Oklahoma that appellants are deemed to have waived and abandoned issues not raised at the trial level; [11/] not assigned for

11/ **Dumas** v. **Conyer**, 448 P.2d. 835 (Okla. 1968).

review in the Petition in Error to the Appellate Court; [12] and not briefed as grounds for reversal. [13] This Court agrees. [14]

Assuming, arguendo, that this issue was properly before the Oklahoma court, petitioners are simply wrong in their interpretation of the decision in *Brown* v. *Marion National Bank*, 169 U.S. 416, 18 S.Ct. 390, 42 L.Ed. 801 and its application to the Oklahoma law. A plain reading of the Oklahoma Statutes and constitutional provision (Pet. Br. p. 9) demonstrates that the legal rate of interest in Oklahoma is that rate on which the parties contract not to exceed ten (10%) percent per annum. [15] In the *Marion* case this court referred to usurious interest as "a greater rate of interest than the law allows". The Promissory Note, (Pet. Br. App. B, p. 54) provides that in the event of default, interest on the principal sum would be "at the highest lawful contract rate on the unpaid balance". Under Oklahoma law this is ten (10%) percent and it was this sum of interest from the date that the Counterclaim was instituted on the note that was included in the Tulsa County judgment. Under the *Marion* decision the bank was entitled to interest at this rate from the time it brought suit on the note.

Nevertheless, had the Petitioner corporation raised this issue it would have been a simple matter for the

12/ **State Insurance Fund** v. **Thieschmann**, 206 Okla. 533, 244 P.2d. 1128 (1952).

13/ **Hawkins** v. **McElhanon**, 315 P.2d. 667 (Okla. 1957).

14/ **Shadwick** v. **Tampa**, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed. 2d. 783.

15/ **Tobin** v. **Holmboe**, 172 Okla. 546, 45 P.2d. 716 (1935).

Tulsa County trial court to calculate the difference between the six (6) and ten (10) percent rates. As will become abundantly clear in a later discussion herein, because of the total judgments against Sports Diversified which the land secured, a reduction of the judgment on the note would be meaningless.

Moreover, the question of whether the transaction was usurious in the first instance remains to be determined.

4. The Oklahoma Appellate Court's Order To The Trial Court That If Upon Retrial Usury Was Determined That The Penalty Be Set-Off Against The Amount Of The Judgment On The Note.

Unlike the preceeding proposition which they now raise for the first time, on this proposition petitioners have changed their position for the third time. At the trial level they sought and secured an order separating the trial on the usury penalty from the trial on the note. These trials were accomplished separately. As they admitted, in their appeal they urged that if the usury penalty was awarded them that its amount be set off against the amount of the judgment on the note. Now, contrary to their argument and brief before the Oklahoma Appellate Court on the basis of which they secured a decision which granted the set off, they ask this court, in effect, to reverse the very decision which they sought and got. It is so well settled as to require no citation of authority that this Court, or any appellate court for that matter, will not consider on appeal a theory inconsistent and opposite to that presented to the court below.

As to the merits of this issue, the Court in *John R. Alley* v. *Federal National Bank*, 124 P.2d. 995 (10th Cir. 1952) cited by Petitioners (Pet. Br. p. 64) simply held that

the procedural aspects of the federal usury statute as laid out in *McCollum* v. *Hamilton National Bank of Chattanooga*, 303 U.S. 245, 58 S.Ct. 568, 83 L.Ed. 819 have been amended by the Federal Rules of Civil Procedure. As pointed out by the Court in the *John R. Alley* case the substantive right created by the federal usury statute is the right to recover twice the amount of the usury as a penalty. It was only under former federal procedure prior to the enactment of the Federal Rules that the penalty had to be recovered in a separate action. On the other hand, if, as petitioners argue, the procedure for the collection of the usurious penalty is governed by state law and not federal procedure then the Oklahoma procedural set-off statute [16/] would govern since the Bank brought suit on its note with its answer to the usury claim. The mandate of the appellate court to the trial court recognizes the set off.

Again, all of the above assumes a decision on the usury question yet to be entered.

5. The Oklahoma Appellate Courts Refusal To Set The Creek County Foreclosure Judgment And Foreclosure Sale Aside.

Petitioners complain that the Oklahoma Appellate Court's opinion and directions should have required that in the event of a finding of usury the Creek County court's judgment foreclosure and foreclosure sale confirmation should be set aside.

16/ 12 O.S. 1971 §324. "*Setoffs--Actions for recovery of money.*-- In any action in which a recovery of money is sought a defendant may set off any cause of action for the recovery of money which he has at the time the answer is filed. Where necessary to avoid delay or prejudice, the court may try the setoff separately."

Of course, the validity of the confirmation procedure is a matter of State law based upon the evidence.

The thrust of Petitioners argument is that a reduction of the Tulsa County judgment must necessarily effect a reduction of the Creek County judgment which included it and therefore it would be violative of due process not to set the Creek County judgment and the sale which resulted aside. This is not so for two reasons, first as a matter of State law and second, as a practical matter it does not deprive the Petitioners of anything.

A. Under Oklahoma Law

The decision of the Oklahoma Appellate Court comports with the rule that a *modification* of a judgment does not effect the title of a purchaser at a foreclosure sale. A judgment creditors title is subject to attack where he takes it at judicial sale upon execution and later the original judgment is *reversed.* Both the Oklahoma Statutes with regard to reversal of the judgment after the sale of the land and the Oklahoma cases had their origin in the Kansas law. Kansas case law is in accord. [17/] But there is a well recognized exception to this rule and briefly stated it is that a *modification* of the judgment does not affect the title acquired by the judgment creditor who bids the property in at an execution sale. See 33 CJS *Executions* §301(2)(b) and 29 ALR 1071 at 1082 (1924).

The ALR annotation summarizes the qualification of the judgment creditor title rule thusly:

> "Where the appellant court merely reduces the amount of the judgment, a sale made there-

17/ **Hubbard** v. **Ogden**, 22 Kan. 671 (1879).

> under to the execution plaintiff will not be avoided, if the modification or reversal does not destroy the grounds for the sale, unless there was some unfairness in the sale, or it appears that the property would on resale bring a larger amount." Citing numerous early cases.

The same Kansas case law followed by the Oklahoma Court recognizes this exception. 18/

The reinstatement of restitution recognizes this exception also stating:

> "Where a judgment is modified and a smaller amount awarded to the judgment creditor, if payment has been made, in excess of the amount finally awarded, the judgment debtor is entitled to restitution of the excess under the same circumstances and from the same classes of persons as where the judgment is reversed. If property of the judgment debtor was seized on execution and sold to a purchaser, the purchaser is entitled to retain the property but the creditor is under a duty of restoring any excess received. If the property has been purchased, by the judgment creditor, the sale will not be set aside but the judgment creditor, will be required to restore the excess amount of net proceeds received by him unless such result would be unfair to the judgment debtor." Reinstatement of Restitution §74, Comment M (1937).

The right of the judgment debtor to set aside an execution sale after a *modification as distinguished from the reversal* of a judgment, has never been passed on by the Oklahoma Court; however the acceptance of the above stated exception has been universal and recently affirmed. 19/

18/ **Pritchard** v. **Madran**, 31 Kan. 38, 2 Pac. 691 (1884).

19/ **Thompson** v. **Thompson**, 378 P.2d 281 (Ore. 1963).

B. As a practical matter

Hypothetically let us examine the practical result of a finding of usury in the transaction and give all the credits which Petitioners urge would result.

The Tulsa County Judgment would simply be reconstituted as follows:

Principal	$261,250.00
Attorneys fees	42,500.00
Interest (after suit at 6%)	21,160.81
Costs	202.20
Total	$325,113.01
Less usury penalty	- 49,799.78
	$275,313.23

Before we move on to see what effect, if any, this reduction would have on the Creek County judgment, the Court need be reminded that the Tulsa County judgment in the reduced amount would bear interest from the date of its rendition, April 15, 1969, through and including the date of the Creek County judgment on March 2, 1970, thereby increasing the Bank's judgment by another $26,710.41 (interest at 10% on $261,250 principal and $42,500 attorneys fees for 321 days) for a grand total at the date of the Creek County judgment of $302,023.64. Of course, the judgment computation is only through March 2, 1970. Interest continued to run until the sale on July 22, 1970, when the Bank purchased the land. This interest amounts to another $11,815.82. The Bank's reduced judgment amounted to $313,839.46 on the day of the sale.

Assuming that this was the only sum to be satisfied by the foreclosure of the mortgage the new amount would have no effect on the previously approved Creek County proceedings. The appraisal of the land which the

court approved was $405,000. In satisfaction of its judgment the Bank bid the statutory two-thirds of $275,000 (the Bank sought no deficiency judgment for reasons which later became apparent). So even in its reduced amount and without the introduction at this point of the amounts of the other Creek County judgment liens, some superior and some inferior to that of the Bank's, the statutory bid required was $38,839.46 short of satisfying the Bank's judgment.

Moreover, the Creek County journal entry lists two judgments imposed as liens against the property prior and superior to that of the Bank's. Of course, both of these had to be paid by the Bank before it could realize on its security, i.e., sell the property after the sale was confirmed. Both of these were imposed by the courts in what the Oklahoma Appellate Court referred to as the "abortive" receivership and bankruptcy reorganization proceeding. They totaled $9,512.30 exclusive of interest.

But the Bank's judgment was not the only judgment lien foreclosed against Sports Diversified's property. The others are listed 1 through 7 in the Creek County journal entry. With interest calculated to the date of the Creek County judgment, they, together with the Bank's judgment as corrected, total $491,809.47, calculated as follows:

1. $5,175 Receivers expenses + interest at 10% for 273 days, $384.93	=	$ 5,559.93
2. Bankruptcy reorganization expenses	=	5,086.60
3. The Bank's judgment *as reduced*	=	313,839.46

4. Business Builders, Inc., $613.34 + interest at 6% for 3 years and 92 days, $119.50, + $200 attorney fees	=	932.94
5. Ainslie Perrault, $16,350.00 + interest at 10% for 2 years and 222 days, $4,288.98, + $1,645.00 attorneys fees	=	22,283.98
6. Carnes Construction Co., $77,118.72 + interest at 10% for 2 years and 222 days, $10,764.35, + $7,700.00 attorneys fees	=	95,853.07
7. Receiver's certificates, $45,078.33 + interest at 10% for 273 days, $3,445.26	=	48,523.49
Total		$491,809.47

The total judgments exceed the approved appraisal of the land ($405,000) by $86,809.47.

And finally, if the Creek County proceedings were set aside and the foreclosure sale invalidated, each of the judgment liens would have to be recalculated since none of them have been paid. Interest on each would continue to accrue against the land until another foreclosure sale is ordered at the rate of $131.00 per day. As of October 31, 1973, a full six years after this suit was filed, the total of the judgment liens against the land would be increased by an additional $177,081.00.

Had petitioners been interested in protecting the land from foreclosure sale they could have superseded the Creek County foreclosure judgment. Had the land had anywhere near a value equal to the judgments

against it they could have secured the bond for supersedeas. They did neither.

To set the Creek County sale confirmation aside through a vacation of the Creek County judgment would gain the petitioners nothing and would destroy the title to property sold to third parties three years ago which has long since developed.

Once again, since the usury issue is yet to be determined, there is no final order from which to seek a review in this Court.

CONCLUSION

This Court should deny certiorari and the judgment of the Oklahoma Court of Appeals should be allowed to stand.

Respectfully submitted,

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